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Buckley J.

[1959 S. No. 3441.]

Trusts—Variation—Act of 1958—*Persons for whom court may approve arrangement—Interest of potential statutory next-of-kin of living person—Sui juris persons who might become entitled to interest at future date — Assumption that life tenant died at date of issue of summons—Whether future date fallen if death assumed—Whether order of court binding on potential statutory next-of-kin—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1 (1) (*b*).

By a settlement dated May 15, 1935, the income of a trust fund was, in the events which happened, held on protective trusts for the daughter of the settlor during her life. On her death the capital and income of the fund were to be held on trust for such of her issue as she should appoint and in default of and subject to any appointment in trust for her children who being male attained 21 years or being female attained that age or married, if more than one in equal shares. Clause 5 of the settlement provided that if the daughter had no child who attained a vested interest the trust fund should be subject to a general testamentary power of appointment vested in the daughter, and in default of and subject to any appointment in trust for the persons who would have become entitled under the Administration of Estates Act, 1925, at the daughter's death if she had died intestate without ever having been married, as tenants in common in the shares in which they would have taken under the Act. The settlor's daughter, who at the date of the issue of the present summons was unmarried and had attained 61 years of age, had three first cousins, all of whom had attained 21 years of age. The daughter sought to vary the trusts of the settlement so that £500 should be held on protective trusts for her during her life and thereafter on trust for any husband who might survive her for life, and subject thereto on trust as to both capital and income for the persons who under the Act of 1925 would have become entitled at her death if she had died intestate without having been married, if more than one as tenants in common in the shares in which they would have taken under the Act, and subject thereto the capital and income of the trust fund should be held upon trust for her absolutely.

On an application by the daughter under section 1 of the Variation of Trusts Act, 1958,[1] for the approval of that arrangement by the court on behalf of all unborn and unascertained persons who might become interested under the trusts of the settlement, only one of the three first cousins being made a party to the application:—

Held, (1) that the arrangement was one which it would be proper to approve on behalf of any persons who might become entitled under the trusts of the settlement who were not in existence.

But (2) that the court could not approve the arrangement on behalf of the two first cousins who were not parties to the summons, for although the persons who would take in default of appointment were the statutory next-of-kin of the applicant, and were a specified class of persons who might become entitled to an interest under the trusts at a future date within section 1 (1) (*b*) of the Act of 1958, the exception in that paragraph required the hypothesis that the future date had fallen on the day on which the originating summons was issued, and, on the hypothesis that the applicant had died at that date, the first cousins would be ascertained and acquire their interest at that date, thus fitting the description in the exception in section 1 (1) (*b*).

ADJOURNED SUMMONS.

By a settlement, dated May 15, 1935, the settlor, Mrs. Rosamund Suffert, directed the trustees to hold the income of the trust fund on protective trusts for her benefit during her life and after her death on protective trusts for the benefit of her daughter, Elaine Rosamund Suffert. After the death of the daughter the trustees were directed to hold the capital and income of the trust fund on trust for such of her issue as the daughter should appoint, and in default of and subject to any such appointment, on trust for her children who being male should attain 21 years or being female attain that age or marry, if more than one in equal shares. Clause 5 of the settlement provided that if there should be no child of the daughter who attained a vested interest the trustees were, subject to the preceding trusts and powers, to hold the trust fund on trust as the daughter should by will or codicil appoint, and in default of and subject to any such appointment, in trust for the persons who would under the Administration of Estates Act, 1925, have become entitled thereto at the death of the daughter if she had died possessed thereof intestate and without ever having been married, as tenants in common in the shares in which they would have taken under the Act.

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[1] Variation of Trusts Act, 1958, s. 1 (1): "Where property, whether "real or personal, is held on trusts "arising, whether before or after the "passing of this Act, under any will, "settlement or other disposition, the "court may if it thinks fit by order "approve on behalf of— . . . (*b*) any "person (whether ascertained or not) "who may become entitled, directly "or indirectly, to an interest under "the trusts as being at a future date "or on the happening of a future "event a person of any specified "description or a member of any "specified class of persons, so how-"ever that this paragraph shall not "include any person who would be "of that description, or a member of "that class, as the case may be, if "the said date had fallen or the said "event had happened at the date of "the application to the court . . . any "arrangement . . . varying or revok-"ing all or any of the trusts. . . ."

The settlor died on October 30, 1939. The daughter, at the date of the present proceedings, was 61 years of age and had never married. The trust fund amounted to some £8,300.

The daughter of the settlor applied to the court under the Variation of Trusts Act, 1958, for its approval, on behalf of all unborn and unascertained persons who might become interested under the settlement, of the following arrangement: a sum of £500 was to be held on protective trusts for the benefit of the daughter during her life and after her death on trust for any husband who might survive her for life and subject thereto, on trust as to both capital and income for the persons who under the Administration of Estates Act, 1925, would have become entitled thereto at the daughter's death if she had died intestate without having been married, if more than one as tenants in common in the shares in which they would have taken under the Act. Subject to that provision the capital and income of the trust fund were to be held on trust for the daughter absolutely.

The first and second defendants to the summons were the trustees of the settlement, the third defendant was the custodian trustee and the fourth defendant was a first cousin of the daughter. The daughter had two other first cousins, neither of whom was a party to the summons, and all the cousins had attained 21 years.

J. A. Wolfe for the applicant.

J. E. Vinelott for the first, second and third defendants. The court cannot bind persons who would constitute the next-of-kin of the daughter if she were to die immediately, and the trustees would be justified in requiring their express consent before carrying the scheme into effect.

John Bradburn for the fourth defendant. The fourth defendant consents to the arrangement.

J. A. Wolfe in reply. The court can sanction the scheme under section 1 (1) (*b*) of the Variation of Trusts Act, 1958, on behalf of the future next-of-kin on the footing that they are unascertained persons, and the consent of those persons who would constitute the next-of-kin if the applicant were to die immediately is unnecessary. Those persons are not persons who would constitute a class if a date had fallen or an event had happened, and they are, therefore, outside the exception provided for in section 1 (1) (*b*). This is because the conception of the next-of-kin of a living person is not known to the law. The next-of-kin of a living person are not a class to be ascertained as if a " date had fallen " or an " event had happened "; they have no existence, real or notional, while the propositus is living.

If that is wrong, the court could certainly not bind an infant who is included in the next-of-kin on the footing of the immediate death of the propositus, for such an infant has no " interest " within section 1 (1) (*a*) but a mere spes successionis. Again, if that is wrong, then the court could not sanction a scheme on behalf of a future husband who might become interested under a discretionary trust already in operation. He would be a person within the exception to section 1 (1) (*b*) and every living male would be a person who would be a member of the class if an event (namely, his marriage) had happened.

BUCKLEY J. stated the facts substantially as set out above and continued: The arrangement is one which I think it is quite proper to approve on behalf of any persons who might become entitled under the trusts of the settlement at the death of the applicant whose interests I am able to bind under the Act.

The persons who would be her next-of-kin if she were to die today are the fourth defendant and two other cousins who are not parties but are sui juris; and the question which I have to decide is how section 1 of the Act is applicable to such case. Section 1 (1) provides: " Where property, whether real or personal, " is held on trusts arising, whether before or after the passing " of this Act, under any will, settlement or other disposition, the " court may if it thinks fit by order approve on behalf of . . . " (*b*) any person (whether ascertained or not) who may become "entitled, directly or indirectly, to an interest under the trusts "as being at a future date or on the happening of a future event "a person of any specified description or a member of any "specified class of persons. . . ." Pausing there, the persons who would take in default of appointment under clause 5 of the settlement as being what I may shortly call the statutory next-of-kin of the applicant are, I should have thought, a specified class of persons, and they are a specified class of persons who may become entitled to an interest under the trusts at a future date. The class cannot be ascertained at present because, of course, you cannot ascertain anybody's statutory next-of-kin while he is alive. Down to that point it seems to me that the terms of the section are appropriate to apply to the present case, subject to what I shall say in a minute about the argument which has been presented to me by counsel on behalf of the applicant. Then the subsection continues: "so however that this paragraph shall "not include any person who would be of that description, or a "member of that class, as the case may be, if the said date had "fallen or the said event had happened at the date of the "application to the court . . . any arrangement . . . varying or "revoking all or any of the trusts . . ."

The date of the application to the court must be the date on which the originating summons is issued. At any rate at first glance, I should have thought that what the subsection required, in a case of the present kind, was that the applicant should be treated as having died at the date of the issue of the summons, to find out who in that event would have been her statutory next-of-kin, and any persons (excluding infants, because they come under a different heading in the Act) who are within that class are persons whose interests the section provides that the court cannot bind. But counsel for the applicant has submitted that that course of reasoning or interpretation of the subsection would give rise to difficulties; and he says that there is no such class of persons as the next-of-kin of a person who is still alive and that there is no future date or future event to which you can relate the ascertaining of that class.

I confess I find it difficult to follow that argument. It is impossible to say who are the statutory next-of-kin of somebody who is alive, but it is not impossible to say who are the persons who would fill that description on the hypothesis that the propositus is already dead. Here, we have a class of persons who may take an interest on the death of the applicant, and they are a class of persons who will be ascertained on that death, so that they would acquire their interest and be ascertained at one and the same date, and upon one and the same event. I do not feel able to come to the conclusion that they are not persons who may become entitled to an interest under the trusts as being at a future date (namely, the death of the applicant) persons falling within the class of her statutory next-of-kin.

If that view is right, as I think it is, then the section provides that I cannot bind the interest of anyone who is at present in existence and would be a member of that class if the applicant had died at the date of the issue of the summons.

So, the order that I am prepared to make in this case will not, in my judgment, bind either of the two absent potential next-of-kin; and the result of that will be that the trustees will not be free, except at their own risk, to treat the trusts as effectively varied until they have obtained the consent of those two persons who have contingent interests in the fund. If they obtain their consent, then I think the trustees would be protected as regards those persons by their consents, as regards Mr. Bradburn's client by his consent which he gives here today, and as regards any other persons who may become entitled to participate but are not at the moment in existence by my order.

Mr. Wolfe says that this interpretation of the section would give rise to peculiar difficulties in certain other circumstances; for instance, if there were a case where protective trusts were declared in favour of a woman and the protected life interest had already determined at the date of the application, so that discretionary trusts had come into operation. He says that one would get into difficulties then with any future husband of the woman. He also says that it is very difficult to apply the section to a case, for instance, where there is a trust for the persons who would be the statutory next-of-kin of A if A were to die at some arbitrarily fixed date in the future, because one cannot begin to ascertain that class by assuming death at some other date. I do not feel that it is open to me, by reference to instances of that kind, to constrain what I think is the natural interpretation of the section and its application to the case before me. I think that cases of that kind will have to be considered if and when they arise. In the present case, my view is that my order will not bind the two first cousins who are not parties but are potential statutory next-of-kin, but I am willing to make an order to bind anyone else who is unascertained who might become interested.

Order accordingly.
Costs of first, second and third defendants to be taxed on a trustee basis; costs of applicant and fourth defendant to be taxed on a common fund basis unless agreed.

Solicitors: *Kingsford, Dorman & Co. for Dudley M. Paul & Co., Liphook.*

M. G. T.

BARCLAYS BANK LTD. *v.* NAYLOR (INSPECTOR OF TAXES).

1960
July 14, 15, 21.

CROSS J.

Revenue—Income tax—Repayment—Discretionary trust for education of children—Deed of covenant—Payments under deed by company to trustees—Application of income for education of children of overseas staff of company—Claim for repayment of tax by child—Whether payments to trustees annual payments—Whether payment in respect of child's education income of parent.

A company had in force a scheme for giving financial assistance to its overseas staff whereby £50 per annum for each child up to a maximum of two children to provide for their education between 13 and 18 years of age was included in the cost of living allowance. This proving inadequate, the directors of the company on November 22, 1956, approved a memorandum to replace it by a new scheme under which a parent would normally be relieved of 75 per cent. of the school fees payable for every child plus £50 per annum per child towards the cost of holiday accommodation, between a child's eighth and eighteenth birthdays. The staff concerned were those whose conditions of service were controlled or influenced by the company, and who worked in territories where appropriate educational facilities did not exist or where the climate was unsuitable for children. A further memorandum dated December 22, 1956, sent to the heads of overseas departments stated that assistance would normally cease on either the death of the child, or the child leaving school, or the parents ceasing to be resident abroad or the death of the father. On March 28, 1957, the company entered into a deed of covenant with four of its employees as trustees in which it covenanted that it would, for a period of 7 years starting with 1957, pay to the trustees on April 1 in each year £27,000 less income tax at the standard rate, the trustees to hold the sums

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BARCLAYS BANK LTD. v. NAYLOR.

upon trust at their discretion to pay or apply them for the maintenance, education or otherwise for the benefit of the beneficiaries named in a list of children of overseas staff.

In February, 1957, C., an overseas employee of the company, requested assistance for his son, M., who was born on November 28, 1947, and who was being educated in England. M.'s name was included in the list of 68 beneficiaries, and C. was told of the following arrangements for the working of the scheme: for each term the trustees were to pay a sum of money into a bank account in M.'s name amounting to 75 per cent. of his school fees plus one-third of £50 towards maintenance during holidays, less United Kingdom income tax at the standard rate. The deficiency was to be made up by a loan equal to the tax deducted in order to meet expenses until M. was able to obtain repayment of tax as a single person resident in the United Kingdom. C. was to pay into M.'s account sufficient to pay the balance of expenses, and when he received the bills he was to forward them to the bank with instructions to pay them and debit M.'s account. The bank would then submit the bills to the trustees so that the payments under the trust could be made to M.'s account. The trustees credited to M.'s account for the Autumn term, 1956, and the Spring term, 1957, a total amount of £143 11s. 8d., of which £82 11s. 3d. was a net grant from the trust and £61 0s. 5d. a loan from the company. C. undertook to repay the loan to the extent that tax was recovered. The bank, as M.'s agent, claimed repayment of the £61 0s. 5d. but the claim was disallowed by the inspector of taxes. On appeal by the bank from a decision of the general commissioners disallowing the claim:—

Held, (1) that since neither C. nor M. were under any legal or moral obligation to do anything in return for any benefits received under the deed, and since any advantage to the company resulted through the performance by the trustees of their duties under the deed, which duties would have been the same if the company had had no commercial advantage in mind, the sums paid by the company to the trustees under the deed of covenant were annual payments within the meaning of the Income Tax Acts and income in the hands of the trustees (post, pp. 20–21).

Inland Revenue Commissioners v. *National Book League* [1957] Ch. 488; 37 T.C. 455; [1957] 2 All E.R. 644, C.A. distinguished.

(2) That the £82 11s. 3d. was paid by the trustees in the genuine and proper exercise of their discretion into M.'s account and did not become part of C.'s remuneration but remained part of M.'s income, notwithstanding that the payment was made in order to pay bills for which C. was legally liable. Accordingly, the claim to £61 0s. 5d. repayment of tax must be allowed (post, pp. 21–22).

Per curiam. If trustees under a trust of this kind think that it is for the child's benefit that the income should be expended in paying a school bill for which the child's parent is liable, or put the income at the disposal of the parent, and he uses it to discharge such a bill, the income does not thereby lose its character of income of the child and become income of the parent (post, p. 22).

Appeal from the Commissioners for the General Purposes of the Income Tax for St. Martin-in-the-Fields, London.

The appellant, Barclays Bank Ltd. (" the bank "), as agent of Michael Haigh Cheetham (" Michael "), an infant, appealed against an objection by the respondent inspector of taxes to a claim made by the bank on behalf of Michael for personal allowances and repayment of income tax for the year ending April 5, 1957. The question in issue was whether a certain sum paid by trustees to a bank account in Michael's name out of taxed income received under the terms of a deed of covenant between Imperial Chemical Industries Ltd. (" I.C.I.") and the trustees was the income of Michael for the purposes of income tax.

The following facts were admitted or proved before the commissioners: At a meeting of the directors of I.C.I., held on November 22, 1956, a scheme was approved for " educational " assistance for expatriates." Such approval was by the adoption of a memorandum dated November 15, 1956, which contemplated the possible setting up of a trust to be financed by I.C.I. The memorandum provided, inter alia, " The difficulty of " getting men of good calibre to serve I.C.I. abroad is getting " greater and also the difficulty of keeping those we have abroad. " This is due to the demand for such people at home, the increased " taxation abroad, and less security and attraction of work abroad " because of nationalist tendencies. Among the chief objections " to service abroad is the difficulty of educating children owing to " lack of appropriate facilities in many places and the high cost " of arranging for children to be housed and educated at home " when the parents are abroad. A scheme of assistance is in " force whereby £50 per annum for each child up to a maximum " of two children is incorporated in married employees' cost of " living allowance. This is intended to pay the premium for " insurance policies to pay for the children's education from 13 " to 18 years old. This is now quite inadequate because even for " this limited purpose it should be increased to £80–£90 per " annum, and even this figure is only correct if the insurance is " taken out when the child is born; the parents may not be " abroad then, and in addition it provides nothing for education " between 8 and 12 years. In many places overseas, children " have to come home to school at 8 years of age. A new scheme " is now recommended for approval by the board to provide part " of the cost of educating the children of certain employees " serving overseas. This is likely to involve setting up a trust "to be financed by I.C.I. The scheme would normally relieve "the parent of 75 per cent. of the school fees actually payable in "each particular case plus £50 per annum per child towards the "cost of holiday accommodation; the trustees (or a committee "if a trust is found not to be advisable) would have discretion in "special circumstances to reduce but not to increase the payment. This would be effective all the time between the child's "eighth and eighteenth birthdays. It has been estimated that "this will provide about 60 per cent. of the total cost of school "fees, extras and holiday expenses of each child.

"People covered by the scheme would be broadly those "expatriates whose conditions of service are controlled or influenced by I.C.I. (therefore normally excluding, for example, "Canadian Industries Ltd., Imperial Chemical Industries of "Australia and New Zealand Ltd., and African Explosives and "Chemical Industries Ltd.) and who work in territories where "appropriate educational facilities do not exist or where the "climate is unsuitable for children. . . . [From the date of the "inception of the scheme] the present educational allowance "would be removed from the cost of living calculation for those "married staff who have children over 8 and who will, therefore, "benefit immediately from the new scheme."

By a memorandum, dated December 22, 1956, I.C.I.'s overseas personnel officer explained to the heads of overseas departments the measure of assistance to be given under the scheme and defined eligibility for participation. By an appendix to that memorandum it was provided that the children of British expatriate staff of I.C.I. (China) Ltd., together with many other overseas companies and their subsidiaries, should be within the scheme. I.C.I. (China) Ltd. was a company incorporated under the Companies Ordinances of Hongkong. It was provided that assistance would normally cease on either (a) the death of the child, or (b) the child leaving school, or (c) the parents ceasing to be resident in a relevant territory as a result of retirement or transfer, or (d) the death of the father.

A letter, dated February, 1957, in the following terms, was sent on behalf of the administrator of the "Expatriate Children's "Bursary Trust No. 1" to John Aldred Cheetham ("Michael's "father"), an employee of I.C.I. (China) Ltd.: "A trust has "been established with the object of assisting in the education of "children of certain overseas residents and I enclose form E.1. "so that if the circumstances warrant it you can apply. This "form should be completed and returned to me without delay.

"Considerable pains have been taken to set up a trustee body "which is distinct and legally separate from I.C.I. or any asso-"ciated company, and this is most important to avoid creating "the impression in any quarter that the payments to be made "are otherwise than by the trust (as distinct from the company) "and to the children (as distinct from the parents). If an "application is made by you, and it qualifies, you will be sent "an explanatory form setting out the arrangements and giving "instructions. From this you will see that care has been taken "to ensure that no suggestion of assistance by the company is "allowed to reach the school or to appear in any way. The "arrangements are confidential to the trustees, the beneficiaries, "the bank and the taxation authorities in the United Kingdom, "and I shall be glad if you will maintain this position.

"As the payments will be the income of the children they "should not in any event be included in the parents' income for "tax purposes but in cases where United Kingdom income tax "has been deducted by the trustees, repayment of the tax will "have to be claimed, and for this reason disclosure has been made "to the Inland Revenue in the United Kingdom only."

Michael's father, accordingly, requested assistance under the scheme for Michael, who was born on November 28, 1947, and who at all material times was being educated in England.

On March 28, 1957, I.C.I. entered into a deed of covenant with four of its employees, the overseas controller, the taxation controller, the assistant secretary and the overseas personnel officer, as trustees. The material provisions of the deed were as follows: "Whereas (i) I.C.I. is desirous of making such provision "as is hereinafter contained for the individuals hereinafter "described as the beneficiaries; and (ii) on or shortly before the "execution of this deed, I.C.I. has approved a list (hereinafter "called 'the initial list') as the initial list of beneficiaries for the "purpose of this deed. Now this deed witnesseth as follows: "1. In this deed the expression 'the beneficiaries' means the "persons whose names are at the material time included in the "list of beneficiaries, that is to say the initial list as varied from "time to time by exercise of the powers contained in the next "following clause. 2. I.C.I. shall have the following powers "exercisable from time to time, namely: (a) Power to add to the "list of beneficiaries the name of any person who at the date "of exercise of the power is either, (i) an infant child of an "overseas employee; or (ii) a child of an overseas employee who "though not an infant is undergoing or about to undergo educa- "tional or vocational training. (b) Power to add to the list of "beneficiaries the name of any person who at the date of exer- "cise of the power is a dependant of an overseas employee. "(c) Power to delete from the list of beneficiaries the name of "any person included therein whether such person was included "in the initial list or was added to the list by exercise of the "foregoing powers of addition. I.C.I. shall not, however, be "under any duty to exercise the foregoing powers if it shall not "choose to do so. In this clause an overseas employee means a "person who at the date of exercise of the power is an employee "resident outside the United Kingdom of any company managed "and controlled for the purposes of United Kingdom income "tax not within the United Kingdom in which I.C.I. then owns "or controls directly or indirectly 35 per cent. or more of the "voting stock. 3. I.C.I. hereby covenants with the trustees that "it will for a period of seven years starting with the year 1957 "pay to the trustees on April 1 in each such year the sum of "£27,000 less income tax at the standard rate for the time being "in force. . . . 4. I.C.I. may from time to time enter into deeds of "covenant to pay further sums to the trustees for the purposes "of this deed and any such further sum so covenanted to be paid "by I.C.I. shall be held by the trustees upon the trusts of this "deed. 5. The trustees shall hold the sums covenanted by "clause 3 hereof to be paid by I.C.I. and any further sums which "may be paid pursuant to any such future deed of covenant as "aforesaid upon trust at their discretion to pay or apply the same "as received to or for the maintenance education or otherwise "for the benefit of all or any one or more to the exclusion of "the other or others of the beneficiaries for the time being, in "such shares and in such manner in all respects as the trustees "in their discretion may think fit, with power to the trustees, in "the case of any infant beneficiary to pay any sum to the "parent or guardian of the infant or to the person in whose "custody the infant is living, for the maintenance education or "benefit of the infant without the trustees being responsible for "the application thereof by such parent guardian or person. "Provided always that: (a) The trustees may at their discretion "postpone the application of the whole or any part of the sums "received at any particular time and apply them at a later time "as if they had been received at such later time; (b) if at any "time there is no person included in the list of beneficiaries then "(subject and without prejudice to the aforesaid power of postponement) the trustees shall apply the sums received at that "time to a charitable purpose; and (c) if at any time the beneficiaries are so few that the sums received exceed in the opinion "of the trustees what should reasonably be applied for the "benefit of the beneficiaries, then (without prejudice to their "aforesaid power to postpone) the trustees shall have power to "apply such part as they shall think of the sums received to a "charitable purpose."

Clause 8 provided that I.C.I. might by simple resolution of its board of directors remove any person from the office of trustee, accept the resignation of any person as a trustee, and appoint new or additional trustees. Other clauses of the deed provided for the administration and duration of the trusts and for the interpretation of the deed.

Michael's father was an overseas employee as defined by clause 2 of the deed by virtue of his employment with I.C.I. (China) Ltd.

The initial list of beneficiaries was approved on behalf of I.C.I. on March 28, 1957: It was of 68 names, including that of Michael. On April 2, 1957, the trustees held their first meeting, at which they considered the initial list of beneficiaries, and in the exercise of their discretion decided that 61 of the 68 children on the initial list should be each paid a specified sum. The sum against Michael's name was £82 11s. 3d.

On April 8, 1957, a letter was sent to Michael's father on behalf of the administrator of the trust stating: "This trust will "operate with effect from the commencement of the autumn "term 1956 and you are advised that your application on behalf "of Michael Haigh Cheetham has been accepted. This letter is "to tell you how the arrangements work and indicate what action "is required by you. 1. In respect of each term a sum of money "will be paid to an account which we will open in the name of "your child at the Millbank, London, S.W.1, branch of Barclays "Bank Ltd. This sum will amount to 75 per cent. of the basic "school fees plus one-third of £50 per annum, i.e., £16 13s. 4d. "towards maintenance during the school holidays, being the sum "which the trustees have decided to pay, less United Kingdom "income tax at the standard rate. The deficiency will be made "up by a loan equal to the amount of the income tax deducted. "The object of the loan is to enable expenses to be met "until your child is able to obtain repayment as a single "person resident in the United Kingdom of the appropriate part "of the tax which has been deducted from the payment. The "word 'appropriate' is used because the repayment will be "affected by other income which the child may possess. When "the repayment of the tax has been received it will be available "to repay the loan. 2. The sums placed by the trustees in the "bank account of your child will in themselves of course (subject "to paragraph 5 below) not be sufficient to meet the school and "holiday expenses, and it is a part of the arrangements that you "should pay into that account a sufficient sum to enable the "school bills to be met. At no time should the account be otherwise than in credit. It is assumed that you are agreeable to "this, but if you are not, will you please say so.

"3. When you receive the school bills you should check them "and forward them forthwith to the bank manager instructing "him in your capacity as parent and/or guardian of the child to "pay them and debit the child's account. The bank manager "will submit the bills to me so that the payments in paragraph 1 "can be made. You will appreciate that what will in effect be "taking place is that the child will be paying his own school "expenses out of income of his own, at least so far as the payments made to him or her by the trustees are concerned. "4. As you will see, the manager of the Millbank branch of "Barclays Bank Ltd. has agreed to co-operate. The repayment "of tax due to the child as a single person will be claimed by the "income tax department of the bank and the repayment will be "credited to your child's account. You will receive in due "course the necessary forms of authority in favour of the bank's "income tax department, so that the tax recovered can be applied "against the loan."

On April 12, 1957, the secretary of the trust sent a further letter to Michael's father containing the following provisions: "I refer to the letter of April 8, in which reference was made to "the amount of money to be credited to your child's account at "Barclays Bank Ltd., Millbank. The account has been opened "in the name of Michael Haigh Cheetham, and the total amount "which has been credited to the account for the autumn term, "1956, and the spring term, 1957, is £143 11s. 8d. This amount "is made up as follows: grant from the trust (net) £82 11s. 3d., "loan from Imperial Chemical Industries Ltd. £61 0s. 5d., total "£143 11s. 8d. This loan is in fact the amount of income tax "at the standard rate deducted from the grant (gross) referred "to in paragraph 1 in the letter of April 8, and to the extent "that the tax is recovered, this loan must be repaid. Attached "to this letter is an undertaking acknowledging the loan and "agreeing to repay to the extent tax is recovered. I should be "obliged if you would sign this and return it direct to me. "In paragraph 4 of the letter of April 8 reference is made to "the claim which is to be made by the income tax department "of the bank for the repayment of the appropriate amount of "tax deducted, referred to in paragraph 1 above. In this connection I enclose a form of authority addressed to the bank authorising them to: (a) Prepare and submit to the Inland Revenue "on behalf of your child the form for repayment of tax; "(b) credit the amount of this repayment to the child's account; "(c) credit Imperial Chemical Industries Ltd. with the same "amount. As you will be operating the account on the child's "behalf, the bank will require two copies of your normal signature. I therefore enclose two 'specimen signature slips' which "should be prepared in the following manner: Normal signature "of parent . . . Name of child . . . In order to assist the bank, "a further form has been devised addressed to the Manager, "Barclays Bank Ltd., Millbank, S.W.1, and a copy of this is "also enclosed. To this form should be attached the school bill "for the summer term 1957. The form authorises the bank to "pay the school bill direct to the school and to debit your child's "account."

Michael's father undertook to repay the loan as required by the letter.

The payment in question before the commissioners was made in accordance with the arrangement set out in the letter of April 8.

It was contended, inter alia, on behalf of the bank that payments made by I.C.I. to the trustees pursuant to the deed of covenant dated March 28, 1957, were annual payments and income in the hands of the trustees; that when the trustees exercised their discretionary power and made a payment to a beneficiary under the said deed they identified the individual who was beneficially entitled to the income which they had received; and that once the income went into the hands of the beneficiary identified by the exercise of the discretionary power it was income of that beneficiary.

It was contended on behalf of the respondent inspector that upon the whole of the evidence the payment in question was in pursuance of an arrangement by which I.C.I. undertook to meet certain liabilities incurred by Michael's father for Michael's education, and to make a contribution towards Michael's maintenance, upon the understanding that his father remained in the employment of a company controlled or influenced by I.C.I.; and that the payment in question was not an annual payment in the sense of the Income Tax Acts.

The commissioners disallowed the claim for repayment of tax and the bank appealed.

F. Heyworth Talbot Q.C. and *H. H. Monroe Q.C.* for the appellant bank. The sums paid under the deed to the trustees were "annual payments." They were pure income profit in the hands of the trustees, payable under an enforceable obligation, and of a recurring nature. The right of the trustees to the payments was in no way dependent on the rendering of services by the trustees or by the parents of the children who benefited. [Reference was made to *Inland Revenue Commissioners* v. *City of London (as Epping Forest Conservators)*.[1]] Whether or not a child's participation in a distribution of trust income could be held to result in additional emoluments to the child's parent is wholly irrelevant to the present issue. The only question here is whether or not the payments made into Michael's account were his income.

If an employer says to his employee: "In consideration of "your services I will pay your son's school fees, send the bill "to me," the sums paid would prima facie constitute part of the employee's emoluments; but if the employer said: "In "recognition of your services I should like to help you indirectly "by giving your child an income," and he covenants with trustees for the payment of £*x* per annum to them for seven years to be held by them on trust for the child absolutely, and the trustees use the money in paying the school fees, the payment is income of the child. It is nihil ad rem that the father's pocket has been relieved.

If the trustees had been given no discretion as to the amounts to be awarded to each child, but the amounts had been defined by the company, Michael would have been the beneficial owner of his share; when the trustees exercise their discretion they are not creating a new source of income. Payments made under a discretionary trust are in no material respect distinguishable: *Drummond* v. *Collins*[2]; *Johnstone* v. *Chamberlain*.[3]

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[1] [1953] 1 W.L.R. 652; 34 T.C. 293; [1953] 1 All E.R. 1075, H.L.

[2] [1915] A.C. 1011; 31 T.L.R. 482; 6 T.C. 525, H.L.

[3] (1938) 17 T.C. 706.

Michael's rights were independent of any contract between the company and his father. [Reference was made to *Inland Revenue Commissioners* v. *Duke of Westminster*.[4]] The commissioners in their decision refer to the "substance of the "arrangement" to be found in the documents, but these go only to the motive of the company.

If there had been no children to benefit under the deed and the trustees had paid the income to charity under clause 5 (b) the sums received would have been income of the charity. The juristic quality of the sums received and distributed by the trustees cannot be affected by the identities of the beneficiaries. If Michael had died when there was any part of the payments in his account, the amount would belong to his personal representatives. The trustees could not recover it; nor would Michael's father be entitled to it in the capacity of an employee of the company.

H. H. Monroe Q.C. following. After the *Duke of Westminster's* case [4] the law so far as surtax was concerned was altered by what is now section 415 of the Income Tax Act, 1952, but the income tax position remained the same. Parliament had the mischief of the case in mind but only legislated for surtax, and therefore the present arrangement is not regarded as mischievous.

F. N. Bucher Q.C., *E. Blanshard Stamp* and *Alan S. Orr* for the Crown. The payments of £27,000 were not annual payments and pure income in the hands of the trustees, since when the company covenanted to pay those sums annually there was a counter-stipulation in the continuance by the employees in the service of the company which would be taken into account by the trustees when administering the trust. It is not sought to impugn the validity or genuineness of the deed, but even a genuine deed must be evaluated by reference to its surrounding circumstances. [Reference was made to the *Epping Forest* case.[5]] A counter-stipulation need not be contractual: *per* Lord Evershed M.R. in *Inland Revenue Commissioners* v. *National Book League*.[6] The employees were giving up an existing benefit under the old scheme in order to benefit under the new scheme.

Payments made under a deed of covenant are not necessarily annual payments. In the *National Book League* case [6] the question was made to depend on the substance of the benefit rather than on the element of recurrence in the benefit. The company received a benefit from the trustees in that they administered the trust and it was important to the company to have an unanxious class of employees; during the performance of the trust the company received something appreciable and personal to it which stemmed from the performance of duties laid on the recipients of the payments, namely, the trustees.

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[4] [1936] A.C. 1; 51 T.L.R. 467; 19 T.C. 490, H.L.

[5] [1953] 1 W.L.R. 652.

[6] [1957] Ch. 488, 503; 37 T.C. 455, 473; [1957] 2 All E.R. 644, C.A.

Alternatively, the £82 11s. 3d. paid into Michael's account, if income at all, was the income of Michael's father; it was paid on the understanding that it was to relieve him and it was an annual addition to his emoluments. Michael is important only to the extent that he is the condition precedent on which the company, through the trustees, help his father. If an employer provides his employee with "money's worth," it will be treated as part of the employee's remuneration: *Nicoll* v. *Austin*[7]; *Inland Revenue Commissioners* v. *Lord Forster*.[8] It can be for a person's benefit that money should be paid to another: *In re Pilkington's Will Trusts*[9]; *Hartland* v. *Diggines*.[10] If Michael's grandmother had entered into a deed of covenant with trustees for the benefit of Michael, and the trustees had paid a school bill for which Michael's father was legally liable, the money expended would have become the income of Michael's father, for only he could incur such a liability.

F. Heyworth Talbot Q.C. replied.

Cur. adv. vult.

July 21. CROSS J. stated the facts substantially as set out above and continued: The decision of the commissioners, which was given in writing, was as follows: "This appeal concerns a "repayment claim made by an infant as a result of a scheme "entered into by the Imperial Chemical Industries Ltd. quite "openly to provide for the education of children of employees of "companies controlled or influenced by the I.C.I. whilst such "employees are abroad in certain territories. We have considered "the deed dated March 28, 1957, and certain correspondence "which took place, both before and after the execution of the deed, "and we are of the opinion that we are entitled to consider the "correspondence and minutes of directors' meetings prior to the "date of the deed to see the substance of the arrangement."

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[7] (1935) 19 T.C. 531.

[8] Ibid. 738.

[9] [1959] Ch. 699; [1959] 3 W.L.R. 116; [1959] 2 All E.R. 623.

[10] [1926] A.C. 289; 42 T.L.R. 262; 10 T.C. 247, H.L.

That, of course, is a reference to the two memoranda, part of which I have read.

"We consider that although the agreement between the I.C.I. "and [Michael's father] which appears from the correspondence "possibly was not legally enforceable, there was a clear under-"standing that a proportion of [Michael's] school fees would be "paid so long as [his father] remained in his overseas employ-"ment, and it was also made clear to him that it would cease "on his transfer or death, and that he would lose the £50 per "annum paid up to date. We consider that (i) I.C.I. were "making these payments to the trustees in order that employees "of companies controlled or influenced by the I.C.I. should have "more attractive emoluments; (ii) such companies would obtain "the benefit of attracting better employees at a smaller cost; and "(iii) that I.C.I. would obtain benefit through the better well-"being of these companies. Therefore we find that the covenant "was not entered into without conditions or stipulations, and "that the payments to the trustees so far as they are utilised for "education grants are not annual payments within the Income "Tax Acts, and for that reason the claim for repayment of tax "fails." The bank asked for a case to be stated, and that is the case which has now come before me.

It is to be observed that the commissioners refer to an agreement between I.C.I. and Michael's father. To my mind, there was no agreement, properly so called, between them at all. There was, in fact, no evidence that Michael's father had seen either of the two memoranda, but I am quite prepared to assume that he fully appreciated the nature of the scheme as it applied to him—that is to say, that he realised that he was going to lose the £50 per annum which had hitherto been included in his cost of living allowance, but that Michael was going to become entitled to an income of a larger amount, to be utilised for his education and holiday expenses, which would come to an end if and when his father ceased to be employed overseas by I.C.I. It is also obvious that I.C.I. did not execute the deed of covenant out of disinterested benevolence, but in order to provide an inducement to people like Michael's father to continue in the service of their subsidiary companies overseas. But there was no agreement between I.C.I. and Michael's father that he should remain in their service in consideration of the provision of an income for Michael.

I think that Mr. Bucher, for the respondent, accepted that this was the position on the facts as found by the commissioners,

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and it is relevant to observe that he did not argue—and, indeed, expressly refrained from arguing—that the deed of covenant and the trust thereby created were not to be taken at their face value. His submissions were twofold. First, he submitted—at least, this was logically, I think, his first submission—that the payments of £27,000 per annum were not annual payments within the meaning of the Income Tax Acts at all; secondly, he submitted that the sum of £82 odd credited to the bank account in Michael's name was not part of his income but was part of his father's remuneration.

In support of his first submission, Mr. Bucher reminded me that a sum paid annually under a deed of covenant is not necessarily an "annual payment." In his well-known judgment in the case of *Earl Howe* v. *Inland Revenue Commissioners*,[1] Scrutton L.J. pointed out that if a man covenants to pay £x annually to a butcher in return for a supply of meat for his family, the sums paid under the covenant are not "annual "payments" within the meaning of the Income Tax Acts from which the payer can deduct tax, but are gross sums which go to swell the receipts of the butcher's trading account. This principle was applied by the Court of Appeal in *Inland Revenue Commissioners* v. *National Book League* [2] to a seven-year covenant in favour of a charity. There the charity in question stated that members who entered into deeds of covenant to pay their subscriptions for seven years would be entitled to enjoy such amenities as were provided from time to time by the charity to its members, even though the subscriptions of other members might be raised.

Mr. Bucher submitted, I think correctly, that the judgment of the Court of Appeal in that case did not depend on the conclusion that the charity had entered into a legally binding agreement with the covenantors. If, in return for the covenant, the payee is, as a practical matter, obliged (whether the obligation is a strictly legal obligation or not) to provide any appreciable recurring consideration to the covenantor, the sums paid under the covenant are not "annual payments" within the meaning of the Income Tax Act. They are not, to use Lord Greene's well-known phrase, "pure income profit" of the covenantee.

I do not think, however, that this principle has any application to the present case. Michael was clearly under no sort of obligation to do anything in return for any benefits he might receive under the deed: nor, as I have pointed out, was his father under any obligation, either legal or moral, to remain in the service of I.C.I. (China) Ltd. Mr. Bucher, recognising this, argued that the performance by the trustees of their obligations under the deed resulted in a continuing consideration to Imperial Chemical Industries Ltd. in the form of a more contented staff. But to say this is, I think, to confuse motive with consideration. Imperial Chemical Industries Ltd. was admittedly not actuated by benevolence in executing the deed. It executed it in order to obtain a commercial advantage; but that advantage will result (if at all) simply through the performance by the trustees of their duties under the deed. These duties would have been precisely the same if the covenantor had had no commercial advantage in mind. The case is again quite unlike the *National Book League* case,[3] for there the charity, as a condition of getting the payments from the covenantor, ceased to be free to use its income for its proper objects exactly as it chose but was, as a practical matter, bound to apply at least some of it in providing benefits for the covenantors.

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[1] [1919] 2 K.B. 336, 352; 35 T.L.R. 461; 7 T.C. 289, C.A.

[2] [1957] Ch. 488; 37 T.C. 455; [1957] 2 All E.R. 644, C.A.

In support of his second submission, Mr. Bucher relied on cases such as *Nicoll* v. *Austin*[4] and *Inland Revenue Commissioners* v. *Lord Forster*,[5] which establish that, if an employer provides his employee with "money's worth," that "money's "worth" will be treated as part of his remuneration for the purposes of tax under Schedule E. No doubt the payment of part of the expense of educating an employee's child may be "money's "worth" to the employee, but the way in which the employer contributed to the education expenses in this case was not by paying the school bills or part of the school bills out of its own money, but by providing the child with an income out of which the bills or part of them could be met. I can well understand that the provision by an employer of an income for a child of the employee may be a benefit to the employee, the fair value of which to the employee ought to be added to his remuneration for the purpose of tax; but this is not sufficient for Mr. Bucher's argument. He must show that the very money which was paid into Michael's account by the trustees became his father's income when the account was debited with the payment of the school bills for which his father had incurred a liability.

If this is so, then it must, I think, be by virtue of some principle which has nothing to do with the relation of employer

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[3] [1957] Ch. 488.

[4] (1935) 19 T.C. 531.

[5] Ibid. 738.

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and employee, but would apply equally to a trust created or a covenant entered into by a grandmother for the benefit of an infant grandchild. Mr. Bucher did not shrink from this conclusion, and submitted that if, under such a trust, the trustees paid a school bill for which the child's parent was legally liable, the money which they expended became income of the parent and ceased to be income of the child. This is, I think, a novel contention on the part of the Revenue, and I can see no justification for it. If trustees, under a trust of this kind, think that it is for the child's benefit that the income should be expended in paying a school bill for which the child's parent is liable, or if they put the income at the disposal of the parent and he uses it to discharge such a bill, I do not see why the income in question should thereby suddenly lose its character of income of the child and become income of the parent.

Of course, in any given case it may be wrong for trustees to exercise their discretion in that way, but that is quite a different matter. In this case, it has not been suggested that the trust was not a genuine discretionary trust, or that the payment of the income in question into Michael's bank account was not a proper exercise of the trustees' discretion under it. In the result, therefore, I think that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *J. W. Ridsdale; Solicitor, Inland Revenue.*

M. G. T.

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Jan. 19, 20, 21, 22, 26, 27; *Feb.* 4.

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DIAMOND *v.* CAMPBELL-JONES AND OTHERS.

[1957 D. No. 482.]

Damages—Sale of land—Loss of profit—Intention of purchaser to develop land—Land ripe for development—Breach of contract of sale—Whether knowledge of purchaser's intention imputed to vendor.

Damages—Tax element—Loss of profits—Contract for sale of land—Purchaser carrying on business as dealer in real property—Breach of contract—Whether damages gross amounts of profits which would have been made.

By an agreement dated July 11, 1956, the defendants agreed to sell to the plaintiff a leasehold house in Mayfair for £6,000. The

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[Reported by Miss PHILIPPA PRICE, Barrister-at-Law.]

agreement provided that the property was sold subject to a contract made in September, 1955, between the reversioners and the defendants which provided that the defendants should carry out extensive works on the property, including complete interior and exterior decoration; and the appropriate works for the conversion of the ground floor and basement into self-contained office accommodation, and the remainder of the premises into one self-contained maisonette. The property was also expressed to be sold on the footing that the permitted use thereof for the purposes of the Town and Country Planning Act, 1947, was indicated in a letter from the Minister of Housing and Local Government to the defendants' solicitors, dated February 15, 1954, the result of an application made by the defendants for planning consent to convert the whole of the property for use as business premises, which, issued as the Minister's formal decision, granted permission for the use of the ground floor as offices and the remainder "for multiple residential "use."

The plaintiff, who had for a number of years carried on business as a dealer in real estate, and had bought and converted a number of houses in central London, stated in his affidavit that his purpose in acquiring the property "as the defendants at all material times "well knew, was to obtain vacant possession so that I could develop "the same by sub-division thereof." But at the time of the agree~~ment neither party knew whether the plaintiff him~~self would convert th~~e house or~~ sell it unconverted. The court having held that the defendants had wrongfully repudiated the agreement, the plaintiff contended that the proper measure of damages was the profit which it was reasonable to suppose he would have made had he converted the property into two maisonettes and ground-floor offices, and the defendants that the proper measure was the difference between the sale price and the market value of the property at the date of the breach.

On a finding by the court that at the date of the contract the defendants had no knowledge as to how the plaintiff proposed to deal with the property:—

Held, (1) that special circumstances were necessary to justify imputing to a vendor of land a knowledge that the purchaser intended to use the land in any particular manner, and that neither the fact that the premises in question were ripe for conversion, nor the fact that everyone concerned recognised that, was sufficient to impute to the defendants knowledge that the plaintiff was a person whose business it was to carry out such conversion or that he intended or was likely to convert it for profit. The plaintiff was not, therefore, entitled to damages measured by reference to the profit obtainable by converting the property, and the proper measure of damages was the difference between the purchase price and the market value of the property at the date of the breach of contract (post, p. 36).

Hadley v. *Baxendale* (1854) 9 Exch. 341; *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997, C.A.; and dicta of Lord

Wright and Lord du Parcq in *A/B Karlshamns Oljefabriker* v. *Monarch Steamship Co. Ltd.* [1949] A.C. 196 at pp. 222, 224, 232; 65 T.L.R. 217; [1949] 1 All E.R. 1 considered.

(2) That since any damages recovered by the plaintiff were liable to attract tax as part of the profits or gains of his business, he was entitled to a sum in damages equal to the gross amount of the profit, the difference between the purchase price and the market value of the property, which he was likely to have made if there had been no breach of contract (post, p. 37).

ADJOURNED SUMMONS.

By a judgment, dated April 24, 1958, in the action *Diamond* v. *Campbell-Jones*, Harman J. declared that the defendants, Mervyn Campbell-Jones, Michael Campbell-Jones and Frank Sewell Bray, had wrongfully repudiated an agreement, dated July 11, 1956, for the sale by the defendants to the plaintiff, Hyman Richard Diamond, of leasehold property known as No. 44, Green Street, Mayfair, for £6,000, and directed an inquiry as to what damages (if any) the plaintiff had suffered as a result of the repudiation. The plaintiff duly took out this summons to proceed under the judgment.

The following facts are taken substantially from the judgment of Buckley J.:

The premises were held under a lease from the Grosvenor Estate, for a term expiring on September 29, 2003, and comprised a basement, ground floor and four upper floors, and there was access through a ground-floor room to a large garden.

By paragraph G of the contract the property was expressed to be sold "subject to and with the benefit of:—(a) a contract "dated September 21, 1955, and made between the reversioners "and the vendors for the grant of a new lease. (b) An agreement "for an underlease dated September 21, 1955, and made between "the vendors of the one part and Anthony Victor Deane of the "other part. (c) A surrender of the lease dated December 1, "1916, referred to in the particulars which will be completed "immediately before the completion of the said new lease referred "to in clause G (a) hereof." The contract also provided, by paragraph J: "The property is sold on the footing that the "permitted use thereof for the purposes of the Town and Country "Planning Act, 1947, is indicated in the letter from the Minister "of Housing and Local Government to the vendor's solicitors "dated February 15, 1954."

The contract referred to in paragraph G (a) of the contract for sale was, in fact, held by Harman J. at the trial to be unenforceable, and Buckley J. found that it was now irrelevant except in so far as it tended to show what was in the contemplation of the parties at the time when they entered into the contract for sale. His Lordship also found that the agreement for an underlease mentioned in paragraph G (b) was also now only relevant in the same way.

The contract referred to in paragraph G (a) was contained in a letter dated June 29, 1955, from the solicitors for the Grosvenor Estate, addressed to the defendants, which contained an offer which was accepted on behalf of the defendants on September 20 or 21, 1955. The letter said: "In answer to your "application we beg on behalf of the special executors of the late "Duke of Westminster to make the following offer, namely, you "to show a title to the term of years granted by the existing head "lease, including the reversion on any existing underleases and/or "agreements for tenancy of No. 44, Green Street, London—and "duly surrender such head lease to the special executors subject "to any existing underleases and/or agreements for tenancy, and "to carry out the works set out overleaf and other matters "mentioned below (all to their satisfaction) and thereupon a new "lease to be granted to you of the same premises upon the following terms . . ." The terms were for the grant of a new lease for a term of years to determine on Michaelmas Day, 2003, at a rental until September 29, 1975, of £280 a year, and thereafter £150 a year. The letter again expressly stated: "You [the defendants] "to carry out the works mentioned in the schedule hereto to the "satisfaction of the lessors or their estate surveyor."

The works referred to were as follows: "1. Clean down the "external brickwork and repair and redecorate the whole of the "premises internally and externally. 2. Carry out the appropriate works for the conversion of the ground floor and basement "into self-contained office accommodation and the remainder of "the premises into one self-contained maisonette in accordance "with the plans to be first submitted to and approved in writing "by the Grosvenor estate surveyor. 3. Carry out such sanitary "works as may be necessary having regard in particular to such "male and female staff as may be employed in the ground floor "office." That arrangement was relied upon as showing that it was clear, at the time that the parties entered into the contract for sale, that the property was one which could be appropriately exploited by converting it from a single unit of domestic occupation to more than one unit of occupation.

The agreement for an underlease entered into between the defendants and Anthony Deane on September 21, 1955, provided,

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by clause 4, that "the lessee should at his expense prior to the "commencement of the said underlease execute the works "required by the superior landlord as set out in the second "schedule hereto," those works being the same as those set out in the letter of June 29, 1955. The letter from the Minister of Housing and Local Government, referred to in the contract for sale, was dated February 15, 1954, and was the outcome of an application made by the defendants for town planning consent to convert the whole of the house to use as business premises. That letter said: "I am directed by the Minister of Housing and "Local Government to say that he has considered the report of "his inspector, Mr. R. A. Hudson, M.T.P.I., following the local "inquiry into the appeal by the trustees of the marriage settle-"ment of Mervyn Campbell-Jones against the London County "Council's refusal to permit the use of No. 44, Green Street, "Westminster, for office purposes on the grounds that such use "does not accord with the council's planning proposals for the "area which are for residential user and that the premises are "capable of occupation in their existing state and are reasonably "capable of conversion into satisfactory self-contained residential "lettings.

"At the inquiry it was stated on behalf of your client, that "the property is no longer suitable for use as a single family "dwelling and that it could not be converted into self-contained "flats without a major alteration and reconstruction of the stair-"case. It was contended that the return to be expected from "such conversion would not justify the heavy expenditure which "would be incurred.

"For the council it was stated that the appeal premises are "situated in an area which is intended solely for residential user "under the provisions of the Administrative County of London "Development Plan, 1951. While it was agreed that the build-"ing is no longer suitable for use as a single family dwelling, "it was considered that its conversion into self-contained flats "could be carried out as a reasonable proposition. Although the "use of the ground floor for residential purposes might produce "some difficulties, it was stated that no objection would be raised "to the use of this floor as consulting rooms.

"The Minister has carefully considered the facts of this case "and the representations made at the inquiry, and he is not "satisfied that, with the exception of the ground floor, the "premises cannot be reasonably converted for multiple "residential use. The Minister agrees, however, that the ground

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" floor could not readily form part of such use, and he thinks, " therefore, that he would not be justified in withholding permis- " sion for its use as an office for a limited period subject to a " condition designed to protect the residential amenities of the " area.

" Accordingly, the Minister has decided to allow the appeal " to the extent that he hereby grants permission for the use of " the ground floor of No. 44, Green Street, Westminster, as " offices, subject to the following conditions:—(i) The windows of " the premises shall be kept curtained and shall not be used for " the purposes of display. (ii) The said use hereby permitted shall " cease on December 31, 1970.

" The Minister hereby refuses permission for the use of the " basement, first, second, third and fourth floors of the building " for office purposes.

" This letter is issued as the Minister's formal decision."

His Lordship found that, although the only effect of that letter was to grant permission to use the ground floor for office purposes for a limited period, it clearly indicated that the application for permission to use the property for " multiple residential use " would be likely to be acceded to. It was common ground that there would be no difficulty in obtaining the consent of the Grosvenor Estate to a modification of the covenant contained in the lease which required the property to be used as a single private dwelling-house, so as to permit the four top floors to be used as two self-contained maisonettes and, subject to the business user permitted until the end of 1970, by the Minister, the ground floor and basement to be used as a self-contained maisonette. It was also common ground that if the Grosvenor Estate were asked to agree to a modification of the covenant, they would require an increase in the rent to a figure of the order of £400 a year, at any rate while the business user of the ground floor continued.

The plaintiff carried on, and had for some years carried on, business as a dealer in real estate, and in the course of that business had bought and converted a number of houses in the centre of London. In his affidavit he said: " I am a fellow of " the Real Estate Institute and have had many years of experi- " ence of dealing in and the management of real estate in all its " forms. For some years prior to the last war, I was actively " engaged in dealing in real estate including both the building " of new premises, the development of estates and the conversion " of old houses into flats. During the war I served in the Royal

"Navy, and immediately after the cessation of hostilities, I again "became active in this field. During the past twelve years or "so, I have effected repairs and conversions to some thirty or "forty buildings, within a radius of two miles around Mayfair. "In most cases, the whole of the works were carried out by myself or through sub-contractors, and for some two years of this "period, I controlled a building company which employed about "one hundred men who were engaged on my work and Government work.

"The purpose of my acquiring the lease of 44, Green Street, "as the defendants at all material times well knew, was to "obtain vacant possession so that I could develop the same by "sub-division thereof. It was obvious that the premises were "far too big for any person in present conditions to be able to "occupy them as a single private residence." His Lordship found that, although the plaintiff stated in his affidavit that his purpose in acquiring the lease was that he should convert the property, his first endeavours were to dispose of the property for single occupation, either for use by an embassy or to a company requiring a prestige address for a senior executive. In cross-examination the plaintiff said that he would have liked to have disposed of the property without doing any works of conversion if he could have done so at a satisfactory profit. He had negotiations with or inquiries from at least four possible purchasers for a sale of this character. In paragraph 4 of his affidavit he said: "I am of the opinion that the proper market value of my interest "in the premises as they stood, with the benefit of the town "planning permission hereinbefore referred to, but the said "schedule of works not having been carried out, is £15,000, but "that the suitability of the premises for an embassy or as the "headquarters of an American television company would have "justified the payment of £17,250."

The plaintiff contended that the proper measure of damages was the kind of profit he would have made had he converted the house into two self-contained maisonettes and ground-floor offices. The defendants contended that the proper measure was the difference between the sale price and market value of the property at the date of their breach of contract.

G. A. Rink Q.C. and *Michael Brown* for the plaintiff. The damages should not be merely the price at which the property could have been sold in the open market on February 19, 1957 (whether to an intending occupier or to an intending investor or developer), but to the amount of the profit which the plaintiff could reasonably have been expected to make by developing the property and then disposing of it as developed. This profit would prima facie include " the developer's profit," which is put at £4,500 subject to the deduction of (i) the developer's expenses on a resale, and (ii) an appropriate deduction for the deferment of his receipt of the ultimate proceeds of the resale.

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The basis of the submission is as follows: In cases of sale of land, except where the special rule known as the rule in *Flureau* v. *Thornhill*[1] applies, the ordinary common law rules as to damages apply. Subject to any special limitations under the rule in *Hadley* v. *Baxendale*,[2] the plaintiff is entitled to be put in the position (so far as damages can do so) in which he would have been if the contract had been completed—i.e., to make the profit which he would in fact have made. Since he was a developer and not a person buying primarily for resale, he is therefore prima facie entitled to the profits which he would have made as a developer. These damages are, however, limited to the loss reasonably foreseeable by the parties at the date of the contract as liable to result from a breach. Such foreseeability will depend on (a) the general knowledge imputed by law to the parties, and (b) any special circumstances known to the parties at that date. The damages under (a) are general damages and the relevant general knowledge need not be pleaded. The damages under (b) are special damages and must be specially pleaded.

The plaintiff has not pleaded special damage and so he can recover only general damages, but he says that the damages referred to above are general damages, because at the date of the contract they would have been reasonably foreseeable in the light of the knowledge imputed by law to the defendants. This knowledge includes knowledge of the facts of everyday life and of the general circumstances of the business of the parties at the time and place of the contract. Moreover, the loss—even if following from a complex series of events—is treated as reasonably foreseeable if the defendants would, had they considered the matter, have realised that the loss was " on the cards."

In the present case the subject-matter of the contract was a house in Mayfair which (i) was not in a complete state of repair and decoration, (ii) had been the subject of a planning appeal by the vendors, in which all parties took the view that it had to be converted, and (iii) was subject to the " offer " of June 29, 1955,

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[1] (1776) 2 Wm.Bl. 1078.

[2] (1854) 9 Exch. 341.

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and its "acceptance" of September 20, 1955. In these circumstances it was at least "on the cards" that the purchaser under the contract would himself convert the property before reselling. Accordingly, damages on this footing are general damages and the plaintiff is entitled to recover them.

H. Heathcote-Williams Q.C. and *Arthur Bagnall* for the defendants. In order that a plaintiff may recover, the damages must be foreseeable. There must be a real danger of the loss being sustained. The principle of *Hadley* v. *Baxendale*[2] is that damages should be those that can fairly and reasonably be considered as arising naturally in the ordinary course of things or may reasonably be in the contemplation of both parties as the probable result of the breach. The loss of profit on the conversion that the plaintiff claims here cannot be said to have arisen in the ordinary course of things out of the breach of a contract of the sale of land. Foreseeability depends on the knowledge of the party in breach (*Victoria Laundry* (*Windsor*) *Ltd.* v. *Newman Industries Ltd.*[3]), and it would be unfair to impute to the defendants the knowledge that the plaintiff required the property solely for the purpose of conversion.

The proper measure of damages in this case is the difference between the market price and the contract price. The market price is the price which the house would fetch on the open market; there is not one market price for developers, another for embassies and another for film companies; there is just one market price, that is, one that takes into account the potential use and suitability of the house for development, for an embassy, for a film company or, indeed, for any lawful purpose. It was not foreseeable that the plaintiff intended to convert the property himself by direct labour. He is not, therefore, entitled to include in his loss of profits the profit he would have made by employing direct labour.

Damages would be subject to tax in the plaintiff's hands: *British Transport Commission* v. *Gourley*[4] and *West Suffolk County Council* v. *W. Rought Ltd.*[5] The defendants should therefore be liable only for damages equivalent to the net profit the plaintiff would have retained after paying tax.

Cur. adv. vult.

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[2] 9 Exch. 341.

[3] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997.

[4] [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.

[5] [1957] A.C. 403; [1956] 3 W.L.R. 589; [1956] 3 All E.R. 216.

February 4. BUCKLEY J. In this case I have to determine the amount of damages payable by the defendants to the plaintiff under a judgment of Harman J., delivered on April 24, 1958, declaring that the defendants had wrongfully repudiated an agreement of July 11, 1956, for the sale by the defendants to the plaintiff of a leasehold property, No. 44, Green Street, Mayfair, for £6,000, and directing an inquiry as to what damages (if any) the plaintiff had suffered as a result of such repudiation. Harman J. having directed that inquiry, the plaintiff in due course took out this summons to proceed under the judgment.

By agreement between the parties, as I understand it, the inquiry was reserved to be taken before the judge, and consequently the master has done no more than see that the evidence filed on the inquiry is in order. Normally, of course, the inquiry would be taken in chambers. I am not complaining in the present case about the course matters have taken because, as will appear, one point of law of some interest has arisen for decision which is not covered directly at any rate by authority as regards a contract for the sale of land. But it ought not to be supposed that in the normal course a summons of this nature should be taken into court instead of being dealt with in chambers, even though cross-examination may be required.

[His Lordship stated the facts and continued:] In my judgment the plaintiff is not entirely correct when he says: "The "purpose of my acquiring the lease of 44, Green Street, as the "defendants at all material times well knew, was to obtain vacant "possession so that I could develop the same by sub-division "thereof." Conversion by the plaintiff was only one of possible alternative methods of turning the bargain to account which he had in mind when he bought it. Notwithstanding what the plaintiff says in paragraph 2 of his affidavit with regard to the defendants' knowledge of his purpose (which has not been elaborated, reinforced or explained in any other part of the evidence), I am not satisfied that the defendants had any knowledge at the date of the contract of how the plaintiff proposed to deal with the property. At that time the plaintiff himself did not know whether he would convert it, or sell it unconverted. These matters are relevant to a point which has been argued about the proper measure of damages to be applied in this case. The plaintiff contends that the proper measure of damages is the kind of profit which it is reasonable to suppose he would have made had he converted the four upper floors into two maisonettes, the

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ground-floor into offices, and the basement either into a self-contained flat or into subsidiary accommodation such as lavatories and storage for the ground-floor offices, and had he disposed of them as so converted. The defendants, on the other hand, contend that the proper measure is the difference between the sale price and the market value of the property at the date of their breach of contract.

The general rule of common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed by way of damages in the same position as if the contract had been performed (*Engell* v. *Fitch* [1]). In the case of a contract for the sale of land this rule is subject to the well-known qualification established by the decision of the House of Lords in *Bain* v. *Fothergill*,[2] which applies in any case in which the breach arises from the vendor's inability to perform the contract on account of a defect in his title. I am not, in this case, concerned with a breach of that kind. I therefore have to consider how the general rule ought to be applied in this case.

Mr. Rink, for the plaintiff, referred me to *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[3] Before I read the passage which I shall cite from that case, it will be convenient for me to read a very well-known passage from the judgment of Alderson B. in *Hadley* v. *Baxendale*.[4] He says: "Where two "parties have made a contract which one of them has broken, the "damages which the other party ought to receive in respect of "such breach of contract should be such as may fairly and reason-"ably be considered either arising naturally, i.e., according to the "usual course of things, from such breach of contract itself, "or such as may reasonably be supposed to have been in the "contemplation of both parties, at the time they made the con-"tract, as the probable result of the breach of it. Now, if the "special circumstances under which the contract was actually "made were communicated by the plaintiffs to the defendants, "and thus known to both parties, the damages resulting from the "breach of such a contract, which they would reasonably con-"template, would be the amount of injury which would ordinarily "follow from a breach of contract under these special circum-"stances so known and communicated. But, on the other hand, "if these special circumstances were wholly unknown to the "party breaking the contract, he, at the most, could only be

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[1] (1869) L.R. 4 Q.B. 659, 666.

[2] (1874) L.R. 7 H.L. 158.

[3] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997, C.A.

[4] (1854) 9 Exch. 341, 354.

"supposed to have had in his contemplation the amount of injury "which would arise generally, and in the great multitude of cases "not affected by any special circumstances, from such a breach "of contract. For, had the special circumstances been known, "the parties might have specially provided for the breach of "contract by special terms as to the damages in that case; and "of this advantage it would be very unjust to deprive them."

Turning now to the *Victoria Laundry* case,[5] the Court of Appeal cited six propositions in six numbered paragraphs as follows[6]: "(1) It is well settled that the governing purpose "of damages is to put the party whose rights have been violated "in the same position, so far as money can do so, as if his "rights had been observed: (*Sally Wertheim* v. *Chicoutimi Pulp* "*Co.*[7]). This purpose, if relentlessly pursued, would provide him "with a complete indemnity for all loss de facto resulting from a "particular breach, however improbable, however unpredictable. "This, in contract at least, is recognised as too harsh a rule. "Hence, (2) In cases of breach of contract the aggrieved party is "only entitled to recover such part of the loss actually resulting "as was at the time of the contract reasonably foreseeable as "liable to result from the breach. (3) What was at that time "reasonably so foreseeable depends on the knowledge then "possessed by the parties or, at all events, by the party who "later commits the breach. (4) For this purpose, knowledge "'possessed' is of two kinds; one imputed, the other actual. "Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to "result from a breach of contract in that ordinary course. This is "the subject-matter of the 'first rule' in *Hadley* v. *Baxendale*.[8] "But to this knowledge, which a contract-breaker is assumed to "possess whether he actually possesses it or not, there may have "to be added in a particular case knowledge which he actually "possesses, of special circumstances outside the 'ordinary course "'of things,' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case "attracts the operation of the 'second rule' so as to make "additional loss also recoverable. (5) In order to make the "contract-breaker liable under either rule it is not necessary "that he should actually have asked himself what loss is liable "to result from a breach. As has often been pointed out, parties "at the time of contracting contemplate not the breach of the

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[5] [1949] 2 K.B. 528.

[6] Ibid. 539, 540.

[7] [1911] A.C. 301.

[8] 9 Exch. 341.

"contract, but its performance. It suffices that, if he had "considered the question, he would as a reasonable man have "concluded that the loss in question was liable to result (see "certain observations of Lord du Parcq in the recent case of "*A/B Karlshamns Oljefabriker* v. *Monarch Steamship Company* "*Ltd.*[9]). (6) Nor, finally, to make a particular loss recoverable, "need it be proved that upon a given state of knowledge the "defendant could, as a reasonable man, foresee that a breach "must necessarily result in that loss. It is enough if he could "foresee it was likely so to result. It is indeed enough, to borrow "from the language of Lord du Parcq in the same case, at page "158, if the loss (or some factor without which it would not have "occurred) is a 'serious possibility' or a 'real danger.' For "short, we have used the word 'liable' to result. Possibly the "colloquialism 'on the cards' indicates the shade of meaning "with some approach to accuracy."

I was also referred by Mr. Rink to the *Monarch Steamship Co.* case,[10] mentioned in the case which I have just read. I think it will be sufficient if I read two short extracts from the speech of Lord Wright in that case, and something from the speech of Lord du Parcq. Lord Wright, discussing this subject, said[11]: "The court will, however, assume that the parties as business "men have all reasonable acquaintance with the ordinary course "of business," and later[12]: "As reasonable business men each "must be taken to understand the ordinary practices and exigencies of the other's trade or business. That need not generally "be the subject of special discussion or communication." Lord du Parcq said[13]: "I do not doubt the wisdom of the judges who, "in *Hadley* v. *Baxendale*[14] and the many later cases which "interpreted or explained that classic decision, have laid down "rules or principles for the guidance of those whose duty it is, "as judges or jurymen, to assess damages. When those rules "or principles are applied, however, it is essential to remember "what my noble and learned friend Lord Wright, and Lord "Haldane in the passage cited by him, have emphasized, that "in the end what has to be decided is a question of fact, and "therefore a question proper for a jury. Circumstances are "so infinitely various that, however carefully general rules are "framed, they must be construed with some liberality, and not

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[9] [1949] A.C. 196, 232; 65 T.L.R. 217; [1949] 1 All E.R. 1.

[10] [1949] A.C. 196.

[11] Ibid. 222.

[12] Ibid. 224.

[13] Ibid. 232.

[14] 9 Exch. 341.

"too rigidly applied. It was necessary to lay down principles "lest juries should be persuaded to do injustice by imposing an "undue, or perhaps an inadequate, liability on a defendant. The "court must be careful, however, to see that the principles laid "down are never so narrowly interpreted as to prevent a jury, "or judge of fact, from doing justice between the parties."

Founding himself on these authorities, Mr. Rink says that the damage to the plaintiff consequent upon the defendants' repudiation of their contract which the defendants could reasonably have foreseen at the date of the contract depends upon the circumstances of which knowledge at the date of the contract ought to be imputed to the defendants. This imputed knowledge, he says, includes the general conditions of everyday life and the general circumstances of the business of the parties. He says that the subject-matter of the contract was a house which everyone considered to be fit only for conversion and no longer to be suited to single occupation; that it was at least "on the cards" that a purchaser would convert the house before disposing of it, and that it follows that if the purchaser in fact intended to do this, and can show that it was reasonable to suppose that his profit by doing so would have been greater than if he had sold the property for its market value at the date of the breach of contract, he is entitled to damages measured by that probable profit. At this point I should observe that not only do the pleadings in the present case contain no allegations that the plaintiff was what I may term a professional converter of town houses, and no allegation that the defendants knew that that was his profession, but also (apart from paragraph 2 of the plaintiff's affidavit to which I have already referred) I have had no evidence at all of any such knowledge or of any actual knowledge by the defendants that the plaintiff either intended or was likely to carry out the conversion of the property himself. Had the pleadings contained such allegations, and had those allegations been proved, it may be that the ordinary common law rule as to the measure of damages to which I have made reference would operate differently than it does in a case in which those facts are not alleged or proved, notwithstanding that the claim was only for general damages. I cannot believe, however, that Lord Wright, in the passages which I have read from the *Monarch Steamship Co.* case,[15] meant that anyone entering into a contract must be treated as having constructive notice of the nature of the other party's business, or of its probable bearing on the loss which that other party might suffer in consequence of a breach of contract. In some cases the nature or the subject-matter of a contract or of its terms may be such as to make it clear that one of the parties is entering into the contract for the purpose of a particular business, and the circumstances may be such that the court will infer that the other party must have appreciated that this was so. It seems to me, however, that this can rarely be the case where the contract is for the sale of land. The vendor of a shop equipped for use as a butcher's shop would not, in my judgment, be justified by that circumstance alone in assuming, and ought not to be treated as knowing, that the purchaser would intend to use it for the business of a butcher rather than that of a baker or candlestick-maker, at any rate in the absence of covenants or other forms of restriction confining its use to butcher's business. Special circumstances are necessary to justify imputing to a vendor of land a knowledge that the purchaser intends to use it in any particular manner.

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[15] [1949] A.C. 196, 222, 224.

In my judgment, neither the fact that No. 44, Green Street was ripe for conversion, nor indeed the fact that everybody recognised this, was sufficient for imputing to the vendors knowledge that the purchaser was a person whose business it was to carry out such conversions, or that he intended, or was ever likely, to convert the house himself for profit. In this connection I would point out that when using the expression " on the cards " in the *Victoria Laundry* case,[16] the Court of Appeal is referring not to possible circumstances which might be relevant to assessing the loss likely to arise from a breach of contract, but to the reasonable probability of a possible loss arising from a given state of knowledge, that is to say, an established state of knowledge of actual relevant circumstances. For these reasons, in my judgment, the plaintiff is not entitled to damages measured by reference to the profit obtainable by converting the property. The damages should be assessed in accordance with the principle normally applicable to cases of breach of contract for the sale of land, where the breach does not arise from a defect in the vendor's title, that is, by reference to the difference between the purchase price and the market value at the date of the breach of contract.

I must therefore consider the evidence as to the market value in February, 1956, of No. 44, Green Street. [His Lordship considered all the material evidence and continued:] I hold that the market value of the property at the relevant date was £14,500. The difference between this figure and the purchase price is accordingly £8,500.

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[16] [1949] 2 K.B. 528.

Such a profit in the hands of the plaintiff would undoubtedly have attracted income tax, and Mr. Heathcote-Williams claims that in accordance with the decision in *British Transport Commission* v. *Gourley*[17] the defendants should only be liable for damages equivalent to the net profit which the plaintiff would have retained after paying tax. In *Gourley's* case,[17] however, it was conceded that no part of the sum awarded as damages would be subject to tax. Similarly, the decision in *West Suffolk County Council* v. *W. Rought Ltd.*,[18] where the principle of *Gourley's* case[19] was applied to an assessment of loss of profit as part of the compensation on a compulsory purchase, proceeded expressly on the basis that such compensation would not be liable to income tax. In the present case, on the other hand, it appears to me that any damages recovered by the plaintiff are liable to attract tax as part of the profits or gains of his business: *London Investment and Mortgage Co. Ltd.* v. *Worthington.*[20] I was also referred in this connection to *Vaughan* v. *Parnell.*[21] If the damages would be taxable in the hands of the plaintiff, in order to give him the degree of indemnity to which he is entitled, I must, I think, award him a gross sum in damages equal to the gross amount of the profit which he would be likely to have made had there been no breach of contract. Accordingly, I hold that the plaintiff is entitled to receive £8,500 damages.

Order accordingly.

Solicitors: *Sampson & Co.; Thorold, Brodie & Co.*

[17] [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.

[18] [1957] A.C. 403; [1956] 3 W.L.R. 589; [1956] 3 All E.R. 216.

[19] [1956] A.C. 185.

[20] [1959] A.C. 199; [1958] 2 W.L.R. 842; [1958] 2 All E.R. 230.

[21] (1940) 23 T.C. 505.

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July 8, 21.

Cross J.

In re HARPUR'S WILL TRUSTS.

HALLER AND ANOTHER *v.* ATTORNEY-GENERAL AND OTHERS.

[1960 H. 922.]

Charity—Imperfect trust provision—Armed forces associations—Residuary gift to "institutions and associations having for their "main object the assistance and care" of wounded or incapacitated servicemen—Unascertained class of potential beneficiaries—Whether charitable—Gift for division between charitable and non-charitable or not wholly charitable associations—Whether validated by Charitable Trusts (Validation) Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 58), *ss.* 1 (1) (2), 2 (1).

A testatrix by her will directed her trustees to pay and divide the residue of her trust estate "between such institutions and "associations having for their main object the assistance and care "of soldiers, sailors, airmen and other members of H.M. Forces "who have been wounded or incapacitated during the recent world "wars" in such manner and in such proportions as her trustees should in their uncontrolled discretion select and deem appropriate.

On a summons to determine, in effect, whether or not that gift was valid:—

Held, (1) that the fact that the main object of an institution or association was charitable did not mean that it was necessarily established for charitable purposes only and that, in the absence of evidence that none of the bodies with the main objects specified in the gift had any subsidiary non-charitable objects, the gift could not be held to be good on the ground that the possible recipients must necessarily be charitable institutions or associations.

Oxford Group v. *Inland Revenue Commissioners* [1949] 2 All E.R. 537, C.A. applied.

(2) That the words in the will describing the main objects of the institutions were merely descriptive of the character of the recipients of the gift and not declaratory of any trust, so that the gift was for a class of institutions or associations who would take absolutely as part of their general funds and, accordingly, if all the members of the class of potential beneficiaries were ascertainable, the trust of residue was good, but if the class was not ascertainable, and they were not all necessarily charities, the gift was void for uncertainty.

In re Ogden [1933] Ch. 678; 49 T.L.R. 341 applied.

(3) That, on the footing that a list of all the institutions which were potential beneficiaries could not be accurately compiled, the gift was not validated by the Charitable Trusts (Validation) Act, 1954, for the Act was concerned with provisions in instruments which declared the objects for which property was to be held or applied, and a trust for division among an unascertained class of charitable institutions and associations and institutions and associations which were not, or were not wholly charitable, did

not fall within section 1[1]; accordingly, the gift was not held on valid charitable trusts.

In re Gillingham Bus Disaster Fund [1959] Ch. 62; [1958] 3 W.L.R. 325; [1958] 2 All E.R. 749, C.A. applied.

ADJOURNED SUMMONS.

The following statement of the facts is taken from the judgment of Cross J.: By her will, dated October 19, 1945, Mary Jane Harpur appointed Eric Haller, Bernard Haller and John Cyril Babington to be executors and trustees, and, after giving a number of legacies and annuities, bequeathed the residue of her personal estate to her trustees on the usual trusts for conversion, payment of debts, funeral and testamentary expenses, and investment. She directed that her real estate should be retained for a period of 10 years from her death and that the income derived from it and also the income of her residuary personal estate should be accumulated during that period. At the end of that period her real estate and the investments representing her personal estate were to be sold and the proceeds applied in the first place in the payment of a number of legacies to various named associations, most of which were undoubtedly charities but one at least of which, namely, the Hull Subscription Library, was probably not a charity. Finally, she directed her trustees to pay and divide the remainder of her trust estate, after providing for any outstanding annuities, "between such "institutions and associations having for their main object the "assistance and care of soldiers, sailors, airmen, and other

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[1] Charitable Trusts (Validation) Act, 1954, s. 1: "(1) In this Act, "'imperfect trust provision' means "any provision declaring the objects "for which property is to be held "or applied, and so describing those "objects that, consistently with the "terms of the provision, the property "could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are "not charitable. (2) Subject to the "following provisions of this Act, any "imperfect trust provision contained "in an instrument taking effect before "the sixteenth day of December, 1952, "shall have, and be deemed to have "had, effect in relation to any disposition or covenant to which this "Act applies—(*a*) as respects the "period before the commencement of "this Act, as if the whole of the declared objects were charitable; and "(*b*) as respects the period after that "commencement as if the provision "had required the property to be held "or applied for the declared objects "in so far only as they authorise use "for charitable purposes."

S. 2: "(1) Subject to the next following subsection, this Act applies "to any disposition of property to be "held or applied for objects declared "by an imperfect trust provision, and "to any covenant to make such a "disposition, where apart from this "Act the disposition or covenant is "invalid under the law of England "and Wales, but would be valid if the "objects were exclusively charitable."

"members of H.M. Forces who have been wounded or incapacitated during the recent world wars" in such manner and in such proportions as her trustees should in their uncontrolled discretion select and deem appropriate. The will contained an express direction that the receipts of the treasurers or honorary treasurers, as the case might be, of the charitable and other associations which benefited under it should be a good discharge to her executors and trustees for the payment over to such associations of the legacies or shares of residue bequeathed to them by the will. The testatrix made two codicils in June and July, 1946, to which it is not necessary to refer, and died on August 12, 1946. Her will and codicils were proved on March 8, 1947, by the executors therein named. All the legacies given by the will, including the legacies payable at the expiration of the 10-year period accumulation which ended on August 12, 1956, were paid. There was one subsisting annuity of £7 a week, and the fund which was distributable under the ultimate gift, subject to that annuity, was of the value of about £65,000.

By the summons, which was issued on April 1, 1960, the two surviving trustees, Eric Haller and Bernard Haller (John Cyril Babington having died in 1953), took out this summons against the Attorney-General and two persons believed to be members of the class of next-of-kin of the testatrix, asking, inter alia, whether, on the true construction of the will, any property representing at the date of the summons the real and residuary personal estate and accumulations of income of the real estate of the testatrix (a) was held on valid charitable trusts for such institutions and associations having for their main object the assistance and care of soldiers, sailors, airmen and other members of His (*sic*) Majesty's Forces who had been wounded or incapacitated during the recent world wars in such manner and in such proportion as the trustees might determine, or (b) was not effectively disposed of by the will and the codicils thereto, or (c) was held on some other and what trusts.

R. Cozens-Hardy Horne for the trustees.

B. J. H. Clauson for the Attorney-General. The point of construction is a very short one. The gift, on pure construction. is a gift to "soldiers, sailors, airmen and other members of H.M. "Forces who have been wounded or incapacitated during the "recent world wars." But, as the testatrix could not put it simply in those words and just leave it at that, because to do so would have left the gift impracticable to implement, she had to particularise "institutions and associations having for their main "object the care of" those persons. Nevertheless, the gift is really a gift "for the wounded"; and the "institutions and "associations" are bound to apply it for their care, and the court should uphold it as a good gift. Even if the court is against the Crown on that, it will not matter if the "institutions or associa-"tions" have some non-charitable objects which are subsidiary or ancillary: see *Keren Kayemeth Le Jisroel Ltd.* v. *Inland Revenue Commissioners.*[2] The Crown relies on that case because in the present case the main object is clearly charitable. Therefore, if the other objects are ancillary, the trustees can pay the money over. The "institutions and associations" contemplated are perforce charitable, so that it must follow that the gift is good. Also, the existence of subsidiary or auxiliary objects which are non-charitable, if any, will not matter, since the institutions and associations need not and will not apply the money to them. There is not before the court evidence sufficient to show whether the possible beneficiaries in the shape of "institutions and asso-"ciations" could be ascertained with exactitude sufficient to make possible the compilation of a list of them, especially as foreign ones could be included. It has therefore been agreed that the court deal with the case on the footing that, for the moment at any rate, an accurate list of that kind could not be made, but that the question be left open in case it should ever become necessary to decide it.

If the court rejects the Crown's construction of the words, it is contended that the gift is validated by the Charitable Trusts (Validation) Act, 1954. True, it has been held that the Act applies only to gifts expressed to be for charitable as well as for non-charitable purposes and not to gifts in which charity is not already mentioned (notwithstanding that all or part of the property concerned can be applied for charitable purposes): *In re Gillingham Bus Disaster Fund.*[3] True, also, the decision was upheld in the Court of Appeal, but it was upheld on other grounds; and Ormerod L.J. took the view that an erroneous view of the scope of the Act had been taken in the court below and that it applied to a trust simply "for public purposes." Lord Evershed M.R. and Romer L.J. indicated, however, that they appreciated the cogency of Harman J.'s view and did not themselves take any final view on that of Ormerod L.J. Nonetheless

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[2] [1932] A.C. 650; 48 T.L.R. 459, H.L.

[3] [1958] Ch. 300, 306; [1957] 3 W.L.R. 1069; [1958] 1 All E.R. 37; [1959] Ch. 62, 69, 75, C.A.

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it is now submitted for the Crown that the court is not, in the circumstances, bound to follow Harman J. and in this case ought not to do so.

Even if this court is bound by *In re Gillingham Bus Disaster Fund*,[3] the gift here is on construction the same as a trust for the distribution of a fund "between charitable or benevolent "institutions or associations." It is to be construed to refer to charity sufficiently to invoke the Act, and section 1 (2) (*b*) confines it to the "declared objects in so far as they authorise use "for charitable purposes." It ought, accordingly, to be upheld.

John Vinelott for the representative next-of-kin. A distinction must be drawn between a trust to distribute a fund amongst institutions who must apply whatever they take in the promotion of a given object and a trust to distribute amongst a class of institutions described by the characteristic of having that given object as one of their objects or their main object. In the latter case what is given to an institution falling within the description forms part of its general funds (*In re Ogden*[4]): the gift is a good gift if the institutions are so described that any institution answering the description must be charitable or if an exhaustive list of all the institutions answering the description can be compiled.

If no such list can be compiled (and it has been agreed that the main question shall be argued on that assumption) the gift is void for uncertainty unless it is saved by the Charitable Trusts (Validation) Act, 1954. It is conceded that the care of wounded ex-service men is by itself a charitable object; but an institution having that object as its main object might not be a charity, since it might have another subsidiary but not merely ancillary object which was not charitable: *Oxford Group* v. *Inland Revenue Commissioners*.[5]

The Charitable Trusts (Validation) Act, 1954, does not apply to this gift for two reasons. The first and narrower ground is that the Act does not apply to a gift which is in the form of a trust to distribute at discretion amongst the members of a class unless the class can, in effect, be severed into two sub-classes, one of which comprises only charitable institutions and the other of which may comprise institutions which are not charitable; in such a case the Act strikes out the second sub-class, e.g., a gift to charitable or benevolent institutions to be selected by trustees.

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[3] [1958] Ch. 300.

[4] [1933] Ch. 678; 49 T.L.R. 341.

[5] [1949] 2 All E.R. 537, C.A.

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It does not apply to a trust to distribute amongst members of a single class which is so described that it might comprise one or more institutions which are not charitable, e.g., a gift to institutions to be selected by the trustees or a gift to benevolent institutions to be selected by the trustees. This was (in a different context) one of the grounds of Harman J.'s decision in *In re Gillingham Bus Disaster Fund*,[6] and his decision on this point still stands.

The second and more general ground is that the Act does not apply at all to a trust to distribute amongst a class of institutions, bodies or individuals who take free from any trust. A trust to distribute a fund amongst a class of named or ascertainable institutions (or individuals) is a valid trust apart from the Act (*In re Ogden*[7]); and the legislature cannot be taken to have intended to vary such a valid private trust merely because one or more of the institutions is or might be a charity or have a charitable object.

Lastly, if sections 1 and 2 of the Act do apply, this case is taken out by section 3. It is conceded that in general the class of the next-of-kin of an intestate must be taken to be ascertained and their rights must be taken to have accrued on the death of the intestate. But the object of section 3 is to preserve the rights of next-of-kin for a limited period so that they may claim the benefit of section 3. In this context their rights should be taken to accrue only when the class of next-of-kin has been ascertained by inquiry or, alternatively, only when the court has decided that there is an intestacy.

B. J. H. Clauson in reply. True it is that the Act may not apply to trusts to divide funds between such members as the trustees may choose to select of bodies of which the character is described and which have objects which are partly charitable and partly non-charitable; but, even so, a body established for purposes purely charitable must use for those purposes whatever it receives as part of its general funds. Therefore, a trust to divide a fund between charitable institutions, even though it be in form a description of those institutions (which is the present case), is to all intents and purposes a provision declaring the objects for which that fund is to be held or applied.

So far as the argument based on section 3 of the Act is concerned, although the class of next-of-kin has not yet been ascertained, their rights have accrued. They are, accordingly, barred under section 3 (2) of the Act.

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[6] [1958] Ch. 300.

[7] [1933] Ch. 678.

Cur. adv. vult.

July 21. CROSS J. read the following judgment, in which he stated the facts as set out above and continued: There is no doubt that the care of wounded soldiers, sailors and airmen is a charitable object; and counsel for the Attorney-General first submitted that the institutions and associations described by the testatrix as possible recipients of the trust fund must necessarily be charitable institutions or associations and that therefore the gift was good.

I cannot accept this submission. As the Court of Appeal pointed out in *Oxford Group* v. *Inland Revenue Commissioners*,[1] the fact that the main object of an institution or association is charitable does not mean that it is necessarily established for charitable purposes only. It may have subsidiary objects which are not charitable, and which are not merely in the nature of powers ancillary to the main object. In the absence of any evidence to show that none of the bodies who have the main objects specified by the testatrix have any subsidiary non-charitable objects, I cannot hold that the residuary estate must be paid exclusively to charitable institutions or associations. I would add that the form of the receipt clause in the will shows that that was also the view of the testatrix or the draftsman of her will.

Counsel for the Attorney-General next argued that, on the true construction of the gift, any money which was paid to any institution which had subsidiary objects of a different character from the main objects described in the will would be held by such institutions on trust to promote the main objects and not as part of its general funds.

I cannot accept this argument either. The words in question appear to me to be merely descriptive of the character of the recipients of the gift and not to be declaratory of any trust. This was the view taken by Lord Tomlin of a somewhat similar disposition in *In re Ogden.*[2] There a share of the residuary estate was given to Lord Samuel to be distributed amongst such political federations or associations or bodies in the United Kingdom having as their objects or one of their objects the promotion of Liberal principles in politics as he should in his absolute discretion select and in such shares and proportions as he should in like discretion think fit. There, as here, it was argued that a trust was attached to the subject-matter of the gift, but Lord Tomlin said[3]: "The reference to Liberal principles is "a reference to the characteristic by which those in the field of "selection are to be identified. I can find no trust at all." I could say the same here. The trust of residue in this case is therefore for a class of institutions or associations which will take anything which they do take absolutely as part of their general funds. Such a trust is perfectly good, whether or not the institutions or associations are charities, if all the members of the class of potential beneficiaries are ascertainable (see *In re Ogden*[4]). If, on the other hand, the class of possible beneficiaries is not ascertainable and they are not all necessarily charities, the gift is void for uncertainty, since the court would have no means of executing it if the trustees refused to do so (see *In re Gestetner*[5] and *Inland Revenue Commissioners* v. *Broadway Cottages Trust*[6]). The evidence before me does not show whether or not it would be possible to compile a list of all the associations who are potential beneficiaries in this case, though as the class is not confined to bodies established in the United Kingdom it may well be that in fact no such list could be compiled with any approach to accuracy. In these circumstances, it was agreed between counsel that I should deal with the case on the footing that no such list could be compiled, but on the understanding that the question can be raised for decision hereafter if necessary.

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[1] [1949] 2 All E.R. 537.

[2] [1933] Ch. 678; 49 T.L.R. 341.

On that footing, having regard to the views which I have already expressed on the construction of the gift, it is clear that the gift must be void unless it is validated by the Charitable Trusts (Validation) Act, 1954. That Act is described in its title as "An Act to validate . . . and restrict to charitable objects, certain "instruments taking effect before the sixteenth day of December, "1952, and providing for property to be held or applied for "objects partly but not exclusively charitable. . . ." Sections 1 (1) (2), and 2 (1) are in the following terms: [His Lordship read sections 1 and 2 (1) of that Act and continued:] In *In re Gillingham Bus Disaster Fund*,[7] the question was raised whether the Act applied only to a gift which was expressed to be for charitable purposes as well as for other non-charitable purposes or also to gifts, such as, for example, a gift for public purposes, in which charity was not expressly mentioned, although the trustees might in fact apply the whole or any part of the property for charitable purposes. Harman J. held that the former view was right. In rejecting the latter argument, he said[8]: "This "is a very far-reaching submission. If it be right, a bequest "'for such objects as my trustees think fit' will be validated "although nothing whatever about charity is mentioned in the "will. The vaguer the words are, the better they will do. In "my judgment, the Act was not intended to produce any such "result. It was, as the long title shows, intended to cure "dispositions whereby part of the trust fund is devoted to "charitable purposes, and part to purposes not charitable, or not "wholly charitable, so long as the whole of the money could be "devoted to charity by excluding words which were too wide "or too vague."

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[3] [1933] Ch. 678, 683.

[4] [1933] Ch. 678.

[5] [1953] Ch. 672; [1953] 1 All E.R. 1150.

[6] [1955] Ch. 20; [1954] 1 All E.R. 878, C.A.

[7] [1959] Ch. 62; [1958] 3 W.L.R. 325; [1958] 2 All E.R. 749, C.A.

The case went to the Court of Appeal, which affirmed the decision of the judge on another ground not material to this case. Ormerod L.J. said[9] that in his opinion the view which the judge had expressed as to the scope of the Act was wrong and that a trust for public purposes simpliciter would be within it. Lord Evershed M.R.[10] and Romer L.J.,[11] on the other hand, refrained from expressing any concluded view on this point and both indicated that they felt the force of what the judge had said on the matter. In these circumstances, I must clearly treat the view of Harman J. on the point as binding on me.

Counsel for the Attorney-General submitted, however, that even on this view of the scope of the Act this case falls within it. This gift, he argued, is equivalent to a trust to distribute a fund between charitable or benevolent institutions or associations. There is, he says, a sufficient reference to charity to bring the Act into play, and the gift can be cured under section 1 (2) (*b*) by confining the possible recipients to wholly charitable institutions having the prescribed main objects.

Counsel for the next-of-kin, on the other hand, submitted that this gift is not equivalent to a gift for charitable or benevolent institutions, and that, even if it is, the Act does not apply to trusts to distribute a fund among institutions to be received by them as part of their general funds, as opposed to trusts for the promotion of objects or purposes.

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[8] [1958] Ch. 300, 306; [1957] 3 W.L.R. 1069; [1958] 1 All E.R. 37.

[9] [1959] Ch. 62, 77.

[10] Ibid. 69.

[11] Ibid. 75.

I cannot accept the first contention. It is true that the will in terms only describes a single class of potential beneficiaries, but I have already held, in accordance with the submission of counsel for the next-of-kin, that this class is divisible into two sub-classes, namely, institutions or associations with the requisite main objects whose other objects, if any, are charitable, and institutions or associations with the requisite main objects whose other objects are not charitable or not wholly charitable. If this sub-division had been expressed, the trust would have been completely analogous to a trust for distribution between charitable or benevolent institutions and it would, I think, be altogether too narrow a view to hold that the fact that the sub-division is not expressed but only implicit in the gift makes any difference. The contention that the Act does not apply at all to a trust for distribution among institutions or associations, as opposed to a gift to promote objects or purposes, is much more formidable. The Act is concerned with provisions in instruments which declare the objects—that is to say, the purposes—for which property is to be held or applied. As Lord Tomlin pointed out in *In re Ogden*,[12] to describe the character of a body which is to take whatever it takes absolutely as part of its general funds is not the same thing as to declare the purposes for which the property is to be used. Take, for example, a trust to divide a fund between such bodies having partly charitable and partly non-charitable objects as the trustees think fit to select. Under such a trust (if it were valid) the whole of the fund might in fact be used for charitable purposes, since each body which received a share of the fund might in fact in its discretion apply what it received for charitable purposes, but it would be an abuse of language to describe the original gift as a provision describing the objects for which the trust property was to be held or applied. If such a trust fell within the Act, then so equally would a trust for division of a fund between an unascertainable class of individuals described by reference to their charitable proclivities —for example, "charitably minded citizens of London"—be within the Act. Counsel for the Attorney-General was, I think, disposed to agree that the Act might not apply to such gifts as these, but he pointed out that whatever a body established for purely charitable purposes receives as part of its general funds must necessarily be used by it for charitable purposes and that therefore a trust to divide a fund between charitable institutions can reasonably be called a provision declaring the objects for which the property is to be held or applied, even though it takes the form of a description of the donees. That may be so; but the form of gift which I am considering is not a trust to divide among charitable institutions—which is plainly outside the Act altogether—but a trust for division among charitable institutions and institutions which are not charitable or not wholly charitable. If such a trust falls within section 1 (1) of the Act where the institutions are not named, it must logically follow that a trust to divide between a number of named institutions, some with wholly charitable objects, others with partly charitable objects, and others with no charitable objects, is within the terms of section 1 (1); yet such a trust is perfectly good, since the class of donees is not uncertain and it would be ridiculous to describe it as an "imperfect trust provision." The terms of section 2 (1) of the Act, of course, make it clear that only dispositions of property which would otherwise be invalid fall within the scope of the Act; but the fact that this point is not made in section 1 (1) and that the type of provision there referred to is called an "imperfect trust provision" shows that the legislature cannot have intended to include in the scope of section 1 (1) trusts for division among institutions, not all of which are wholly charitable, which may be valid trusts, as opposed to trusts for the promotion of non-charitable purposes which must necessarily be bad.

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[12] [1933] Ch. 678.

It was urged on me that there is no evident reason for drawing a distinction between a trust for the promotion of charitable or benevolent objects and a trust for division between an unascertained class of charitable or benevolent institutions. This argument would have more weight with me if I knew what the Act was intended to achieve. If the legislature considered that the old-established principles of law applied in *Chichester Diocesan Fund & Board of Finance (Inc.)* v. *Simpson (Diplock's* case)[13] led to results which were generally unsatisfactory, it would presumably have enacted that all gifts for the promotion of objects or the benefit of unascertainable bodies described by such adjectives as "benevolent," "public," "philanthropic" or the like should henceforth be treated as equivalent to gifts for the promotion of charitable objects or the benefit of charitable institutions. But the legislature has done no such thing. The

[13] [1944] A.C. 341; 60 T.L.R. 492; [1944] 2 All E.R. 60, H.L.

Act leaves the law untouched for the future but, for some reason which I do not pretend to understand, validates retrospectively a limited number of dispositions which had already failed. I do not know on what principle these particular dispositions were selected for favourable treatment, and so I see no reason for construing this Act liberally.

For the reasons which I have tried to give, I think that it is only by doing great violence to the words used that section 1 (1) of the Act can be made to include trusts for division among institutions or associations as opposed to trusts for the promotion of purposes. I shall, therefore, declare that the residuary estate is not held on charitable trusts, leaving open the question whether, even on that footing, the disposition is nevertheless valid.

Counsel for the next-of-kin submitted that, even if this gift fell within the terms of sections 1 and 2 of the Act, it was taken out of the operation of the Act by section 3. It is not strictly necessary for me to express any view on this point; but, as this case may well go higher, it is perhaps desirable that I should do so. The class of next-of-kin has not yet been ascertained, and the argument is that until one knows for certain who the next-of-kin are, or at least who some of them are, no rights have accrued to anyone. I cannot accept this argument. I think that prima facie the rights of the next-of-kin accrue on the death of the person who dies intestate or partially intestate whether or not the personal representatives or anyone else knows who they are or that the estate or any part of it is undisposed of. In this case it may well be that, having regard to the trust for accumulation and payment of legacies at the end of the 10-year period, section 3 (3) applied and that the rights of the next-of-kin did not accrue until August 12, 1956. Even so, however, they became barred under section 2 (2) on August 12, 1957, since neither of the exceptions to that subsection applies here. Had I been against counsel for the next-of-kin on the main point, I should therefore have held that he failed on his submissions under section 3.

I will make a declaration under paragraph 1 that any property representing the real and residuary personal estate and accumulations of income is not held on valid charitable trusts. I will not declare, under (*b*), that it is not effectively disposed of, because, for all I know, it may be possible to produce some evidence that these bodies are substantially ascertainable. Then, on *In re*

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Ogden,[14] the gift would be perfectly good. I will limit my decision to a declaration that any property representing the real and residuary personal estate and accumulations of income is not held for purely charitable purposes.

Declaration and order accordingly.

Solicitors: *Freshfields; Treasury Solicitor.*

K. R. A. H.

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[14] [1933] Ch. 678.

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July 20, 21, 22, 29.

Cross J.

CENLON FINANCE CO. LTD. *v.* ELLWOOD (INSPECTOR OF TAXES).

ELLWOOD (INSPECTOR OF TAXES) *v.* CENLON FINANCE CO. LTD.

TABLEAU HOLDINGS LTD. *v.* WILLIAMS (INSPECTOR OF TAXES).

WILLIAMS (INSPECTOR OF TAXES) *v.* TABLEAU HOLDINGS LTD.

Revenue—Income tax—Profits of trade—Dividends—Exclusion—Capital profits dividend—Dealer in stocks and shares—Whether dividend taxable as profits.

Revenue — Income tax — Assessment — Agreement of computation by inspector—Subsequent additional assessments—Whether a "discovery" by inspector—Whether inspector precluded by agreement from making additional assessments—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 41 (1), 50 (2), 510.

On October 16, 1953, company A. started to trade as a dealer in stocks and shares. On October 20, 1953, it bought the whole of the share capital in company B. for £72,000. On November 2, 1953, company B. paid to company A. a dividend of £25,000 out of a capital profit which it had made on the sale of freehold land and which was not, therefore, liable to tax in the hands of company B. On December 4, 1953, company A. sold its holding of shares in company B. for £27,500. On July 1, 1955, company A. submitted to the inspector of taxes accounts for the period October 16, 1953, to April 15, 1955, together with a computation of its profits for the purposes of Case I of Schedule D to the Income Tax Act, 1952, from which dividends from United Kingdom companies (including that received from company B.) were excluded. Details of these dividends having been requested by and supplied to the inspector, he wrote to the accountants to company A. agreeing their computation and in August, 1955, he issued notices of assessment for the years 1953–54 and 1954–55 in accordance with company A.'s figures. In November, 1955, he issued a notice of assessment for the year 1955–56 in accordance with the figures agreed.

In May, 1956, a new inspector of taxes was appointed; in June, 1956, having received a memorandum from the chief inspector of taxes and read the documents relating to company A.'s affairs, he reached the conclusion, inter alia, that the dividend received from company B. and another dividend should have been included as trading receipts in the computation of company A.'s profits for the purposes of Case I. On June 18, 1956, he informed company A.'s accountants that the two dividends should be brought into Case I computation of company A. and subsequently additional assessments for the years 1953–54 to 1955–56, and a first assessment for the year 1956–57 were made on that footing. Company A. appealed to the special commissioners, who decided that the dividend received from company B. should have been included in the Case I computation; that, as regards the years 1953–54 to 1955–56 the new inspector had made a discovery within the meaning of section 41 of the Income Tax Act, 1952,[1] but that as regards the years 1953–54 and 1954–55 company A. and the then inspector had come to an agreement within the meaning of section 510 of the Act[1] and, therefore, section 50 (2) of the Act[1] prevented the raising of additional assessments under section 41. Both parties appealed:—

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[1] Income Tax Act, 1952, s. 41: "(1) If the surveyor discovers that "any properties or profits chargeable "to tax have been omitted from the "first assessments; . . . (ii) where "the tax is chargeable under "Schedule D, the Additional Com"missioners shall make an assess"ment on the person chargeable, in "an additional first assessment, in "such a sum as, according to their "judgment, ought to be charged . . ."

S. 50 (2): "An appeal, once "determined by the Commissioners, "shall be final, and neither the deter"mination of the Commissioners, nor "the assessment made thereon, shall "be altered, except by order of the "court when a case has been required "as provided by this Act."

S. 510: "(1) Subject to the pro"visions of this section, where a per"son gives notice of appeal to the "General Commissioners, the Special "Commissioners or the Board of "Referees against an assessment "to . . . income tax . . . and, before "the appeal is determined by the "Commissioners or Board, the sur"veyor . . . and the appellant come "to an agreement, . . . that the "assessment . . . should be treated "as upheld without variation, or as "varied in a particular manner or as "discharged or cancelled, the like "consequences shall ensue for all pur"poses as would have ensued if, at "the time when the agreement was "come to, the Commissioners or "Board had determined the appeal "and had upheld the assessment . . . "without variation, had varied it in "that manner or had discharged or "cancelled it, as the case may be."

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CENLON FINANCE CO. LTD. v. ELLWOOD.

Held, that the exemption of dividends from income tax implied in the deduction provisions of the Income Tax Act, 1952, was a general exemption and excluded dividends, for tax purposes, from the receipt side of an account, the balance of profit on which was subject to tax under Case I of Schedule D, and that there was no distinction, for this purpose, between dividends paid out of capital profits and those paid out of revenue profits, and that, therefore, the dividend paid by company B. was properly left out of the computation of company A's liability to tax (post, pp. 65, 66–67).

Hughes v. *Bank of New Zealand* [1938] A.C. 366; 54 T.L.R. 542; [1938] 1 All E.R. 778, H.L. applied.

Held, further, that although section 50 (2) of the Act of 1952 meant no more than that the determination of the appeal by the commissioners was to be final with regard to the particular matter which was the subject of the appeal, an inspector of taxes who had come to an agreement with the taxpayer within the meaning of section 510 on a particular point at issue was nevertheless precluded from raising an additional assessment under section 41 in relation to that issue. If, therefore, the dividend should have been included in the original assessment, the special commissioners were right in holding that additional assessments could not be made for the years 1953 to 1954 and 1954 to 1955 (post, pp. 68, 69).

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

A company, Cenlon Finance Co. Ltd., appealed against assessments made upon it under Case I of Schedule D for the years 1953–54, 1954–55, 1955–56 and 1956–57 in the sums of £10,452, £22,134, £22,134 and £22,241 respectively. The assessments for the years 1953–54 to 1955–56 were additional assessments.

The following facts were found by the special commissioners: The appellant company was registered on October 12, 1953. It carried on business as a dealer in stocks and shares and was assessable to income tax under Case I of Schedule D in respect of any profits arising from such dealings. The company began trading on October 16, 1953. Henry White (Sutherland House) Ltd. ("Henry White") was a company carrying on business as ladies' outfitters. On October 20, 1953, the company acquired the whole of the issued share capital of Henry White, 20,000 £1 shares, for £72,000. Henry White had previously sold some of its freehold property at High Street and at Ironmarket, Newcastle-under-Lyme, and realised thereby a profit which was a capital profit and had not been assessed to tax in its hands.

On November 2, 1953, Henry White paid to the company, its sole shareholder, a distribution of £25,000 out of such capital profit pursuant to the following special resolution of October 23, 1953: "That the sum of £25,000 surplus moneys in the hands of "the company representing part of the capital profit arising from "the sale of the company's properties at High Street and Ironmarket and being an accretion to capital be distributed amongst "the present holders of the shares in the capital of the company "pari passu and in proportion to the number of such shares "respectively held by them and on the footing that they become "entitled thereto as capital and the directors are hereby authorised and directed to distribute the same accordingly." On December 4, 1953, the company sold its holding of shares in Henry White for £27,500.

During the course of its trading from October 16, 1953, to April 15, 1955, the company made various purchases and sales of stocks and shares, received commission, and sold a debt at a profit.

On November 19, 1954, Schedule D assessments were made on the company for the year 1953–54 in the estimated amount of £500, and for the year 1954–55 in the estimated amount of £1,000. Formal notice of appeal against both these assessments was given on the company's behalf on November 22, 1954, the grounds stated being that the company had not yet prepared accounts relevant to the years of assessment.

On July 1, 1955, accounts were submitted for the period October 16, 1953, to April 15, 1955, together with a computation of the company's profits as adjusted for the purposes of Case I of Schedule D in which the sum of £33,231 dividends received from United Kingdom companies (including the Henry White dividend of £25,000) was deducted and excluded from the profits. On July 21, 1955, H.M. Inspector of Taxes for the St. Martin's District wrote to the company's accountants, inter alia, as follows: "3. *Profit on Trading* £634. A copy of the account is "required to show how this profit is made up. . . . 5. I shall be "glad to have particulars of the dividends paid out of profits not "charged to income tax of £33,000." On July 27, 1955, the accountants replied, inter alia: "3. *Profit on Trading* £634: "Commission received, £22,519; Profit on debt bought, £1,930; "Profits on dealing in stocks and shares (see separate schedule), "£31,623—£56,072. Losses on dealings in stocks and shares "(see separate schedule), £55,438—£634. . . . 5. Dividends paid "out of profits not charged to income tax, £33,200; Henry White "(Sutherland House) Ltd.: Distribution out of capital reserve "created from the surplus arising from the sale of certain of the "company's fixed assets—£1 5s. per share, £25,000. Abraville "Securities Ltd.: Distribution out of profits not subject to income tax—£164 per share, £8,200—£33,200."

On August 8, 1955, the inspector wrote to the accountants agreeing their computation and wrote again on August 15, 1955, enclosing notices of assessment for the years 1953–54 and 1954–55 amended so as to agree with the accountants' figures. On November 24, 1955, the inspector issued a notice of assessment for income tax Schedule D for the appellant for the year 1955–56 in the amount of £107 in accordance with the figures agreed as above.

In May, 1956, D. E. Lupton, H.M. Inspector of Taxes, succeeded to the charge of the St. Martin's Tax District. In June, 1956, having received a memorandum from the Chief Inspector of Taxes he read the correspondence and other documents relating to the company's affairs and reached the conclusion that the dividend of £25,000 received by the company from Henry White should have been included as a trading receipt in the computation of the company's profits for the purposes of Case I of Schedule D, and that the first assessments for the years 1953–54 to 1955–56 inclusive should have been made accordingly. He did not have any facts in relation to the company's affairs before him additional to those before his predecessor in 1955. On June 18, 1956, the new inspector wrote to the accountants as follows: "With reference to the accounts for the year ended on the 15th "April, 1955, I consider that the two items amounting to £33,200 "(viz. £25,000 from Henry White (Sutherland House) Ltd. and "£8,200 from Abraville Securities Ltd.) are of an income nature "and should be brought into the Case I liabilities of the company," and subsequently the assessments appealed against were made.

After the assessments had been made, the profits of Abraville Securities Ltd., out of which the dividend of £8,200 had been paid, were assessed to tax. In view of this fact, the inspector dropped his claim in respect of the dividend received by Cenlon from that company.

It was contended on behalf of the appellant company that: (1) Formally, as regards years 1953–54, 1954–55 and 1955–56, there had been no discovery within the meaning of section 41 of the Income Tax Act, 1952, and that, therefore, the additional assessments under appeal for all those years were not competent. (2) As regard the years 1953–54 and 1954–55: (a) The proper officer of the Crown and the appellant had come to an agreement, within the meaning of section 510 of the Income Tax Act, 1952, on the specific point that the dividend of £25,000 received by the company from Henry White should not be included in the computation of the company's Case I profits. That agreement was concluded on August 8, 1955, or on August 15, 1955. (b) The effect of that agreement was that the like consequences ensued for all purposes as if an appeal on that specific point had been determined by the commissioners. (c) Consequently, under section 50 (2) of the Income Tax Act, 1952, the agreement was final and could not be altered since there had been no appeal to the High Court. (d) The effect of raising additional assessments was to attempt to alter what was in effect a final determination. (e) The effect of section 50 (2) of the Income Tax Act, 1952, was that where a specific point had been determined on appeal and there was no appeal to the High Court, an additional assessment could not be raised under section 41 of that Act. (3) Subject to the above contentions, that a dividend paid by a company resident in the United Kingdom, whether tax had been deducted from it or not, was not in itself taxable in the hands of the recipient. If a dividend was not taxable, it could not be included in a computation of Case I profits, since to include it in such a computation was to subject it to tax.

It was contended on behalf of the inspector of taxes that: (1) As regards the years 1953–54, 1954–55, and 1955–56, there had been a discovery by the inspector within the meaning of section 41 of the Income Tax Act, 1952, that the company had been undercharged in the first assessments for each of those years, and in consequence of that discovery additional assessments had been validly made in accordance with the provisions of the section. (2) As regards the years 1953–54 and 1954–55, the additional assessments were not barred by reason of the settling of the appeals against the first assessments under section 510 of the Income Tax Act, 1952 (which was admitted), nor by reason of the provisions of section 50 (2) of that Act as applied to such settlements, nor by reason of the issue having already been determined, inasmuch as: (a) neither section 510 nor section 50 (2) of the Income Tax Act, 1952, had any bearing on the meaning of "discovery" under section 41 of that Act; (b) section 50 (2) of the Income Tax Act, 1952, applied only to the particular assessment which had been determined on an appeal, and did not apply to the additional assessments in the present case; (c) neither section 50 (2) nor section 510 of the Income Tax Act, 1952, operated by way of estoppel to prevent the raising of an additional assessment under section 41 of that Act, the doctrine of res judicata having no application to the decisions of income tax commissioners. (3) The dividend of £25,000 received by the company from Henry White was a receipt of the company's trade and, as such, had to be taken into account in computing the amount of the profits or gains of that trade for the purpose of assessment to income tax under Case I of Schedule D.

The commissioners decided (1) that, as regards the years 1953–54, 1954–55 and 1955–56, there had been a discovery within the meaning of section 41; (2) that, as regards the years 1953–54 and 1954–55, an agreement within the meaning of section 510 had been reached that the dividend paid by Henry White was not to be included in the computation of the company's Case I liability, and that the effect of that agreement was the same as if there had been an appeal which had determined that the dividend was not to be included in the computation of the company's Case I liability and, therefore, section 50 (2) operated to prevent the raising of additional assessments to include the dividend, and (3) that the dividend was a receipt of the company's Case I trade which should have been included in the computation of its Case I liabilities.

In due course the figures for the years 1955–56 and 1956–57 were agreed, and on May 12, 1959, the additional assessments for 1953–54 and 1954–55 were discharged, and the additional assessment for the year 1955–56 was reduced to £16,667, and the assessment for the year 1956–57 to £16,774. Both parties appealed.

The appeals in *Tableau Holdings Ltd.* v. *Williams* (*Inspector of Taxes*) raised the same point and no separate argument was addressed to the court.

CENLON FINANCE CO. LTD. *v.* ELLWOOD (INSPECTOR OF TAXES).

Philip Shelbourne for the appellant companies. Dividends of any sort received from United Kingdom companies by any sort of United Kingdom taxpayer are not subject to tax in his hands. It is accepted that all dividends paid by United Kingdom companies, whether paid out of capital or revenue profits, are income in the hands of the shareholders; but dividends paid by United Kingdom companies are only subject to tax to the extent that the company is permitted, by section 184 of the Income Tax Act, 1952, to deduct tax therefrom. The company can deduct tax only if it has paid the dividend in question out of taxed profits. The authorities show that whether the dividends are paid out of taxed profits or not makes no difference to the fact that there is no direct assessment to tax at all: see *Bradbury* v. *English Sewing Cotton Co. Ltd.*[2] as to dividends paid out of taxed profits, and *Gimson* v. *Inland Revenue Commissioners*[3] as to dividends paid out of untaxed profits.

The authorities show that, although it might appear on reading Schedule D that every item of income is taxed under some Case and, if no other Case is appropriate to a particular item, it is taxed under Case VI, that does not apply to dividends from United Kingdom companies, which bear tax under section 184 or not at all, notwithstanding that they come within the wording of either Case I or Case VI. In *Gimson* v. *Inland Revenue Commissioners*[4] Rowlatt J. rejected an argument that a dividend from which tax was not and could not be deducted could be assessed under Case VI. That decision was approved in the House of Lords in *Neumann* v. *Inland Revenue Commissioners.*[5] The position of dividends in relation to tax has been explained by the House of Lords in several cases: *Inland Revenue Commissioners* v. *Blott,*[6] *Inland Revenue Commissioners* v. *Cull,*[7] *Canadian Eagle Oil Co. Ltd.* v. *The King*[8] and *Inland Revenue Commissioners* v. *Reid's Trustees.*[9] All those cases say that there is no charge to tax under Schedule D, not that there is no charge under Case VI of Schedule D; and, when the House of Lords was faced in *Selection Trust Ltd.* v. *Devitt*[10] with a taxpayer assessed under Case I, it did not qualify the general observations made in the other cases. To draw a distinction between a Case I assessment of a trading company and other assessments is to do violence to the language of the House of Lords in all those cases for they never said that the exemption applies only to individuals nor that it is only an exemption from direct taxation under Case VI. They said that dividends are not taxable under Case VI, or Schedule D or at all. Before the commissioners the Crown relied on *Liverpool and London and Globe Insurance Co.* v.

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[2] [1923] A.C. 744; 39 T.L.R. 590, H.L.

[3] [1930] 2 K.B. 246.

[4] Ibid.

[5] [1934] A.C. 215; 50 T.L.R. 246, H.L.

[6] [1921] 2 A.C. 171; 37 T.L.R. 762, H.L.

[7] [1940] A.C. 51; 55 T.L.R. 1049; [1939] 3 All E.R. 761, H.L.

[8] [1946] A.C. 119; (1945) 61 T.L.R. 577; [1945] 2 All E.R. 499, H.L.

[9] [1949] A.C. 361; [1949] 1 All E.R. 354, H.L.

[10] [1946] A.C. 119.

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Bennett,[11] which decided that a foreign dividend can be assessed under Case I or Case IV as the Crown pleases. That has nothing to do with the present case. Dividends paid by United Kingdom companies are not taxed under Schedule D, not because they do not come within the words of Schedule D, but because they are taken out of Schedule D and dealt with under section 184.

Hughes v. *Bank of New Zealand*[12] decided that an item of income which was not chargeable because it consisted of interest on war loans could not be brought into charge by disregarding its true nature and taxing it under Case I as a trading receipt, and that trading receipts in a profit and loss account could be dissected to discover the true nature of the items contained in the account. The decision in *Liverpool and London and Globe Insurance Co.* v. *Bennett*[13] is based on the principle that a profit and loss account can be dissected in this way. The present case is analogous to *Hughes* v. *Bank of New Zealand*[14] and, therefore, the dividend cannot be taxable merely because it is a trading receipt. The commissioners said that, in the present case, there was no specific exemption from tax as there was in *Hughes* v. *Bank of New Zealand*[15]; but the authorities show that dividends are not taxable and, since a dividend falls within the wording of Schedule D, it is not taxable only because section 184 operates as an exemption to take it out of Schedule D.

Roy Borneman Q.C. and *Alan S. Orr* for the Crown. Section 184 of the Income Tax Act, 1952, is not a charging section; it is a machinery section, as was its predecessor, Rule 20 of the Income Tax Act, 1918; it is quite wrong to dignify that rule and section 184 of the Act of 1952 as a self-contained system of taxation.

The Crown agrees that dividends are not taxable as such—the authorities say so, although there is nothing in the Act to say so. The appellant companies' approach to this case is to consider a dividend as a potential item of assessment. The right approach, however, is to look at what was assessed. The cases relied on by the appellant companies say that a dividend is not assessable as such under Schedule D. They are all irrelevant, because there is, in this case, no assessment of a dividend. The assessment is of profits under Case I. Cenlon has been charged as a company liable to tax under Case I and it is liable to tax on the full profits of the year preceding the year of assessment. In the case of a company which trades in stocks and shares a dividend paid by part of the stock-in-trade of the company is a receipt of the trade, and is not shut out of a Case I computation merely because, as a dividend, it is not assessable.

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[11] [1913] A.C. 610; 29 T.L.R. 757, H.L.

[12] [1938] A.C. 366.

[13] [1913] A.C. 610.

[14] [1938] A.C. 366.

[15] Ibid.

[CROSS J. You would not object to saying that the cases are equal to a section saying that dividends are not assessable as such?]

No. Dividends are not assessable as such; but a section to that effect would not prevent an assessment under Case I. What is charged under Case I is not dividends but profits. There is nothing in the authorities to prevent a dividend from being included in the receipts of the trade for the purposes of Case I.

The Lords of Appeal in *Canadian Eagle Oil Co. Ltd.* v. *The King* [16] only addressed their minds to an attempt to assess a dividend as such. They did not and did not intend to say that dividends are exempted from taxation. The application of the dicta of the House of Lords in the cases cited for the appellant companies should not be carried beyond dividends as such, for to do so would be to defeat the clear intention of the House of Lords. In many cases their Lordships did use the words " as " such ": see, e.g., *per* Lord Tomlin in *Neumann* v. *Inland Revenue Commissioners.*[17] In *Hughes* v. *Bank of New Zealand* [18] the interest was specifically and by statute exempted from taxation, and the case was decided on the footing that there was an exemption in unqualified statutory language.

Philip Shelbourne in reply. The Crown's contention is the same as that which the Crown put forward unsuccessfully in *Hughes* v. *Bank of New Zealand.*[19] It is not, therefore, a sufficient answer to say that it is profits and not dividends which are being taxed. The crucial question is, what is the nature of the exemption of the charge on dividends? If it is a true exemption, and if there is a reason for it, it comes within the decision of *Hughes* v. *Bank of New Zealand.*[20] The reason for the exemption is that without it taxation would be destructive of companies. The Crown has produced no authority to support its contention that the exemption is confined to dividends as such. To say " dividends are not taxable " and " dividends as such are not taxable " is to say the same thing. The words " as such " add nothing to " dividends."

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[16] [1946] A.C. 119.

[17] [1934] A.C. 215, 228.

[18] [1938] A.C. 366.

[19] Ibid.

[20] Ibid.

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Once a provision to the effect that dividends as such are not taxable is implied in the Act this case comes within *Hughes* v. *Bank of New Zealand.*[20] It is submitted, however, that there is no need to imply such a provision, for it is to be found already in section 184 of the Act. That is not a charging section, but it is one which exempts from taxation. But for the existence of section 184 a dividend would be taxable under Schedule D, for it comes within the wording of Schedule D. The rationale of all the cases is that dividends are not taxable because they are exempted by section 184. If they are not exempted by that section they would be taxable under Case VI and *Neumann* v. *Inland Revenue Commissioners*[21] would have been wrongly decided. Section 184 is, therefore, just as much an exempting provision as section 46 of the Finance Act, 1918, which was the provision in question in *Hughes* v. *Bank of New Zealand*,[22] which must, therefore, apply to the present case.

The Crown has not sought to tax the Abraville dividend, on the ground that it has already borne tax. If dividends lose their identity and can be taxed under Case I as trade receipts it is not logical not to tax the Abraville dividend. It is clearly a trade receipt. If the Crown's argument is correct, why does it not say that all dividends, whether tax has been deducted therefrom or not, when paid to a company trading in stocks and shares, come into the receipt side of the profit and loss account and lose their identity and are, therefore, taxable?

[*Borneman Q.C.* This is a new point. The Abraville dividend was not taxed because to tax it would be double taxation: *Thompson* v. *Trust and Loan Company of Canada.*[23]]

ELLWOOD (INSPECTOR OF TAXES) *v.* CENLON FINANCE CO. LTD.

Roy Borneman Q.C. and *Alan S. Orr* for the Crown. When the new inspector was instructed by the chief inspector that the dividend had been wrongly excluded from the Case I computation, the new inspector made a " discovery " notwithstanding that he had no facts before him that had not been before the original inspector: *Commercial Structures Ltd.* v. *Briggs.*[24]

It is agreed that the correspondence between the inspector and the company constitutes an agreement, within the meaning of

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[20] [1938] A.C. 366.

[21] [1934] A.C. 215.

[22] [1938] A.C. 366.

[23] [1932] 1 K.B. 517; 48 T.L.R. 209, C.A.

[24] [1948] 2 All E.R. 1041, C.A.

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section 510, of the appeals against the first assessments for 1953–54 and 1954–55. Section 510 was introduced to save time so that, where an agreement has been reached, it is not necessary to go before the commissioners. Section 510 (1) provides that where, before an appeal is determined, an agreement is reached, the like consequences shall ensue as if the commissioners had determined the appeal in accordance with the agreement. To see what those consequences are it is necessary to look at section 50 (2), which is the ceiling beyond which section 510 does not purport to go. The Crown can, therefore, be in no worse position where an agreement has been reached than where the case has been heard by the commissioners and determined adversely to the Crown.

The express provisions of section 41 prevail over the provisions of section 50 (2) for, unless full rein is given to section 41, its operation will be stultified. The determination of an appeal does not operate as an estoppel for all purposes: *Inland Revenue Commissioners* v. *Brookes*[25] and *Inland Revenue Commissioners* v. *Sneath.*[26] A similar decision was reached in *Society of Medical Officers of Health* v. *Hope*[27] in regard to the decision of a local valuation court that a certain hereditament was exempt from paying rates. In *Anderton and Halstead Ltd.* v. *Birrell*[28] Rowlatt J. rejected[29] an argument that, where an appeal had been determined, an additional assessment was barred by section 133 (2) of the Income Tax Act, 1918, which was in similar terms to section 50 (2). The general principle to be gathered from the cases is that a section such as section 41 prevails over a section such as section 50 (2): see also *Gundry* v. *Dunham*,[30] *per* Warrington L.J.[31]

It is conceded that, if the point had been argued before, and determined by, the commissioners, and no case had been stated for the opinion of the High Court, section 50 (2) would prevent an additional assessment under section 41 because the way in which mistakes of the commissioners are rectified is by way of case stated. However, where the mistake is that of an inspector, section 41 prevails and an additional assessment can be raised whether the inspector failed altogether to raise the point or raised it and was persuaded to abandon it by the taxpayer: see *Williams*

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[25] [1915] A.C. 478; 31 T.L.R. 89, H.L.

[26] [1932] 2 K.B. 362; 48 T.L.R. 241, C.A.

[27] [1960] 2 W.L.R. 404; [1960] 1 All E.R. 317, H.L.

[28] [1932] 1 K.B. 271; 47 T.L.R. 528.

[29] [1932] 1 K.B. 271, 280.

[30] (1915) 32 T.L.R. 142; 7 T.C. 12, C.A.

[31] 7 T.C. 12, 24.

v. *Trustees of W. W. Grundy*[32] and *Commercial Structures Ltd.* v. *Briggs.*[33]

Philip Shelbourne for the companies. There is no authority for the Crown's proposition that section 50 was introduced either for the convenience of the Revenue or to save time. It was introduced to achieve finality after a case had been heard by the commissioners, if there was no case stated. The determination and the assessment made thereon which are made final by section 50 (2) are a determination and assessment of the amount of the profits and gains of the taxpayer for the year in question: see *per* Romer L.J. in *Inland Revenue Commissioners* v. *Sneath.*[34] Section 510 directs one to assume that the commissioners have, contrary to the facts, determined the appeal. One must, therefore, consider section 50 (2), bearing in mind that the only relevant assumption is that the commissioners have determined the taxpayer's income for the year in question. An additional assessment in a case such as the present, where something is alleged to have been omitted from the profits and gains, must necessarily alter the determination by increasing the amount of those profits and gains, because what the commissioners determined was the amount of the income for the year and not merely the correctness of the assessment. If this restricts the operation of section 41, that does not matter. It is perfectly consistent with the appellant companies' argument that the legislature intended that, when a case had been fully ventilated on appeal, there was to be no time for further assessments. That construction does not destroy section 41. It only limits it to a case in which there has been no determination by the commissioners, whether actual or assumed under section 510. Section 41 is not a self-contained code, for section 47 contains time limits on additional assessments which are not contained in section 41. The appellant companies do not contend that anything should be read into section 41, but that that section is subject to the subsequent provisions of sections 47 and 50. Even in the case of fraud, the commissioners could not make an additional assessment after an appeal had been determined, just as, where perjury has been committed, someone who has been acquitted because of that evidence cannot be retried. There is no distinction between section 62 (2), which applies to Cenlon, and section 50 (2), which applies to Tableau.

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[32] [1934] 1 K.B. 524.

[33] [1948] 2 All E.R. 1041, C.A.

[34] [1932] 2 K.B. 362, 390.

However, even if the determination of the commissioners is not the determination of the taxpayer's income for the year but is the determination of a particular point, it is submitted that the particular point in the present case had been determined because section 510 provides that one is to assume that the commissioners have determined an appeal on the particular point covered by the agreement, namely, that the dividend was not to be included in the Case I assessment of Cenlon.

Under section 129 of the Income Tax Act, 1952, a taxpayer is entitled to have the tax for the second and third years in which a new trade is carried on charged on the actual profits of those years and not on the first year's profits. If the inspector had appealed the first assessment and the court had decided that the Crown's contention was right, no doubt the appellant companies' would have given a notice under section 129. However, the notice must be given within two years of the end of the second year of assessment so that they would now be precluded from giving such a notice. This illustrates the difficulties which would ensue from cutting down the clear words of section 510.

On the authorities, the most that can be said is that the obiter dictum of Rowlatt J. in *Anderton and Halstead Ltd.* v. *Birrell*[35] is against the appellant companies. It is, however, merely an obiter dictum, and therefore not binding on this court. Further, Rowlatt J. said[36] that an actual appeal would not have decided the issue finally; but the Crown concedes that that is the one case in which an additional assessment could not be made, which is to abandon the dictum of Rowlatt J. All Warrington L.J. was saying in *Grundy* v. *Dunham*,[37] was that he was not satisfied that a provision for finality of appeals had anything to do with additional assessments, and Swinfen Eady L.J. made no reference to this point. In the appellant companies' favour are the House of Lords in *Inland Revenue Commissioners* v. *Brookes*[38] and the Court of Appeal in *Inland Revenue Commissioners* v. *Sneath*[39] and *Society of Medical Officers of Health* v. *Hope*.[40]

Borneman Q.C. in reply. The appellant companies are asking the court to construe sections 41 and 50 (2) in a sense contrary to that in which every other judge has construed them. It has never before been suggested that the dictum of Rowlatt J.

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[35] [1932] 1 K.B. 271, 280.

[36] Ibid.

[37] 7 T.C. 12, 24.

[38] [1915] A.C. 478.

[39] [1932] 2 K.B. 362.

[40] [1960] 2 W.L.R. 404.

in *Anderton and Halstead Ltd.* v. *Birrell*[41] was not right. All the cases proceed on the assumption that it was right. The determination is not the determination of the income for the year but of the particular point in question on the appeal: see *Caledonian Railway Co.* v. *Banks.*[42]

Cur. adv. vult.

July 29. CROSS J. stated the facts and continued: The special commissioners decided: (1) That the dividend paid to Cenlon Finance Co. Ltd. by Henry White should have been included in the computation of the company's tax liability under Case I of Schedule D. (2) That, as regards the years 1953–54, 1954–55 and 1955–56 the new inspector had made a "discovery" within the meaning of section 41 of the Income Tax Act, 1952, but, (3) that as regards the years 1953–54 and 1954–55, section 510 (1) of the Income Tax Act, 1952, prevented the raising of additional assessments under section 41. The commissioners therefore upheld the additional assessment for the year 1955–56 and the first assessment for the year 1956–57 as amended by excluding from them the dividend received from Abraville Securities Ltd., but they discharged the additional assessments for 1953–54 and 1954–55. Neither party was satisfied with this decision, and I have before me an appeal by the company and a cross-appeal by the inspector of taxes.

I will deal first with the company's appeal. A company, which is in law a separate entity from its shareholders, pays tax on the revenue profits which it earns. It is under no legal obligation to divide any, let alone all, of its profits among its shareholders. If and when it decides to pay a dividend, whether out of revenue profits which have borne tax or out of capital profits which have not borne tax, the sums paid to the shareholders are received by them as income. Logically, it might appear to follow that such sums should themselves be liable to tax in the hands of the recipients; but, though there is no express exemption, the provisions which have always appeared in the Income Tax Acts in one form or another, enabling companies to deduct tax from dividends paid to their shareholders, have been construed as impliedly exempting dividends from tax in the hands of the shareholders.

At one time, it was suggested that this was because the tax paid by the company was paid by it as agent for its shareholders.

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[41] [1932] 1 K.B. 271, 280.

[42] (1830) 1 T.C. 487.

This idea is now discredited. The true view is that, although the tax which the company pays is its own tax and not tax which it pays as agent for its shareholders, payment of tax by the company franks the dividends which it distributes from further tax in the hands of the shareholders. In effect, when one comes to consider the tax liability of the shareholders, the company is treated as though it was a partnership in which the shareholders were partners, and the profits made by the company are treated as though they had been made by the shareholders. The general position, as I have stated it, has been explained by the House of Lords in many cases, stretching from *Inland Revenue Commissioners* v. *Blott*,[1] decided in 1921, to *Inland Revenue Commissioners* v. *Reid's Trustees*,[2] decided in 1949.

The question at issue here is whether the recipient of a dividend is not only freed from liability to be assessed to tax on the dividends themselves, but is also entitled to have the dividends excluded for tax purposes from the receipt side of an account, the balance of profit on which is subject to tax under Case I of Schedule D. I do not see how the answer to this question can depend in any way on whether the dividend has been paid out of capital profits or out of revenue profits. To include dividends paid out of revenue profits in an assessment under Case I of Schedule D, though it might seem unfair, would not involve any double taxation, and it is clear that dividends are not exempted from tax because it would be unfair to tax them. If that was the reason for their exemption, dividends paid out of capital profits on which the company has paid no tax would be liable to be taxed directly as income in the hands of the recipient. The exemption which is implied from the deduction provisions in the Act applies to all dividends alike, and the extent of the exemption must, I should have thought, be the same for all alike.

If, therefore, the inspector is right with regard to the Henry White dividend, I do not see how he was justified in dropping his claim with regard to the Abraville dividend. But why should the exemption of a dividend from tax be confined to a charge to tax on the dividend itself and not extend to a charge under Case I of Schedule D? Counsel for the Crown relied strongly on the fact that several of the Lords of Appeal in the cases to which I have referred stated that tax was not payable on dividends "as

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[1] [1921] 2 A.C. 171; 37 T.L.R. 762, H.L.

[2] [1949] A.C. 361; [1949] 1 All E.R. 354, H.L.

"such" (see, for example, Lord Tomlin's words in the case of *Neumann* v. *Inland Revenue Commissioners*).[3] He asked me to infer that the speakers had in mind the possibility that tax might be payable on dividends as items in a receipt and payment account. I doubt whether the speakers had this possibility in mind at all. It seems to me more likely that they used the qualifying words "as such" because tax is payable on the revenue profits of the company out of which dividends are normally paid; and, in any case, it is to be observed that other Lords have not used the qualifying words "as such" at all (see, for example, Lord Atkin's statement in *Cull* v. *Inland Revenue Commissioners*).[4]

On the other hand, I think that the decision in *Hughes* v. *Bank of New Zealand* [5] tells strongly against the contention of the Revenue. In that case, the bank, which was not resident in the United Kingdom, was assessable to income tax under Case I of Schedule D on the profits arising from the trade carried on at its London branch office. Among the assets held by the London branch were certain holdings of 5 per cent. War Loan, and it was held that the exemption conferred by section 46 (1) of the Income Tax Act, 1918, in respect of War Loan interest where the War Loan is in the beneficial ownership of a non-resident was unlimited, with the result that the interest was not only exempted from tax as interest, but could not be taxed indirectly by inclusion in the bank's trading receipts for the purpose of assessment under Case I of Schedule D.

As appears from the judgment of Romer L.J.,[6] it was argued by the Revenue in that case that the charge in Case I of Schedule D was not a charge of the interest as such to tax, but simply a charge to tax of the balance of profits and gains of a trade, and that the exemption did not apply. The courts rejected this argument, dissected the trading receipts, discovered among them the items of War Loan interest, and held that there was no reason why the general exemption of such interest from tax should not apply to an assessment under Case I of Schedule D. In my judgment, the exemption of dividends from income tax which is implied in the deduction provisions of the Income Tax Act is a general exemption analogous to the express exemption of War Loan interest in the beneficial ownership of a non-resident.

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[3] [1934] A.C. 215, 228; 50 T.L.R. 246, H.L.

[4] [1940] A.C. 51, 56; 55 T.L.R. 1049; [1939] 3 All E.R. 761, H.L.

[5] [1938] A.C. 366; 54 T.L.R. 542; [1938] 1 All E.R. 778, H.L.

[6] [1937] 1 K.B. 419, 451; 53 T.L.R. 258; [1936] 3 All E.R. 975, C.A.

In the result, therefore, in my judgment, the dividend in question here was properly left out of the computation of the appellant company's liability to tax under Case I of Schedule D. In view of this conclusion, it is not strictly necessary for me to consider the other points in the case, but as the matter may go further, I propose to deal with them.

The relevant provisions of the Income Tax Act, 1952, are, stated briefly, as follows: Section 41 (1): If the surveyor discovers that any properties or profits chargeable to tax have been omitted from the first assessments, then where the tax is chargeable under Schedule D the additional commissioners shall make an assessment on the person chargeable in an additional first assessment in such a sum as, according to their judgment, ought to be charged, and any such assessment shall be subject to appeal. Section 47 (1): Subject to the provisions of the section and to any provision of the Act allowing a longer period in any particular class of case, an additional first assessment may be made at any time not later than six years after the end of the year to which the assessment relates, provided that where any form of fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to income tax, additional assessments may, for the purpose of making good to the Crown any loss of tax attributable to the fraud or wilful default, be made at any time.

Section 50 (1): Save where expressly authorised by the Act, the general commissioners shall not alter any assessment before the time for hearing and determining appeals, and then only in cases of assessments appealed against, and in accordance with their determination. Subsection (2): An appeal once determined by the commissioners shall be final, and neither the determination of the commissioners nor the assessment made thereon shall be altered except by order of the court when a case has been required as provided by this Act.

Section 510 (1): Subject to the provisions of the section, where a person gives notice of appeal to the general commissioners against an assessment to income tax and, before the appeal is determined by the commissioners, the surveyor or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment shall be treated as upheld without variation or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time that the agreement was come to, the commissioners had determined the appeal and had upheld the assessment without variation, had varied it in that manner or had discharged or cancelled it as the case may be.

The issue between the parties has been narrowed by admissions made on each side. In the first place, the Crown admits that the correspondence between the inspector of taxes and the company's accountants in July and August, 1955, constituted an agreement in writing within the meaning of section 510 for the variation of the estimated assessment in accordance with the figures put forward by the company. Secondly, the company admits that, having regard to the decision of the Court of Appeal in *Commercial Structures Ltd.* v. *Briggs*,[7] I must hold that when the new inspector, acting on instructions from the chief inspector of taxes, took the view that the dividend in question was wrongly excluded from the company's accounts which had been submitted to his predecessor in July, 1955, he made a " discovery " within the meaning of section 41. The question at issue between the parties is, therefore, how far, if at all, is section 41 controlled by section 50 (2)? Section 41 does not itself place any limit on the time within which a " discovery " may be made. Section 47 expressly cuts down the period in which additional assessments may be made to six years in cases where there has been no fraud or wilful default. Is the right to make additional assessments consequent on a " discovery " further cut down by section 50?

Counsel for the company argued that what was made final by section 50 (2) was the determination by the commissioners of the amount of the taxable income of the taxpayer for the year to which the appeal related, and that once an appeal had been heard in no circumstances could any further additional assessment be made in respect of that year's income. If this were right, then it would follow that if an appeal was brought against an assessment on some point of law, the Revenue authorities could not make an additional assessment after the hearing of that appeal, even if they found that the taxpayer had fraudulently concealed the true amount of his receipts for that year. I see no reason for construing section 50 in a way which would lead to so extravagant a result. I think that the section means no more than that the determination of the appeal by the commissioners is to be final with regard to the particular matter which was the subject of the appeal. This was the view taken by Lord Atkinson of section 57 (10) of the Taxes Management Act, 1880, which is in very similar terms to section 50 of the Income Tax Act, 1952: see *Inland Revenue Commissioners* v. *Brooks.*[8]

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[7] [1948] 2 All E.R. 1041, C.A.

Even on this construction, however, section 50 may still conflict with section 41 in cases in which the inspector changes his mind without having any fresh facts before him. Suppose that an appeal is brought on a point of law and decided by the special commissioners against the Revenue; that the inspector, being satisfied that the commissioners were right, does not ask for a case to be stated; but that, subsequently, the courts decide in another case that the view of the law taken by the special commissioners was wrong. In such a case, the inspector, on hearing of the court's decision in the other case, would have discovered that the first assessment was wrong within the meaning given to the word "discovery" by the Court of Appeal in the *Commercial Structures* case.[9] Nevertheless, I think that he would be precluded by section 50 from raising an additional assessment.

Further, I think that the same result would ensue if, instead of contesting the appeal and losing it, the inspector agreed to its being allowed by the commissioners; or, to take the matter a stage further back, if he came to an agreement with the appellant within the meaning of section 510 on the point at issue.

It is true that in this case the company's notice of appeal did not raise the question whether or not the Henry White dividend should be included in the computation of its profits. It was simply a notice of appeal against estimated assessments; but the question whether the dividend should be included was raised by the inspector when he saw the accounts, and he agreed to the estimated assessments being reduced on the footing that the dividend ought not to be included. The agreement which he made was, therefore, in substance, equivalent to the allowing of an appeal by the company against the inclusion of the dividend.

It follows, in my judgment, that if, contrary to the view which I have expressed, the dividend should have been included in the original assessments, the special commissioners were right in holding that no additional assessments could be made for the years 1953–54 and 1954–55.

[8] [1915] A.C. 478; 31 T.L.R. 89, H.L.

[9] [1948] 2 All E.R. 1041, C.A.

The second case before me, *Tableau Holdings Ltd.* v. *Williams* (*Inspector of Taxes*), raises the same points as those on which I have given judgment in the *Cenlon Finance Co. Ltd.* case. The only material difference in the facts is that the notice of appeal by the taxpayer was against the inclusion of the capital profit dividend in the computation of its profits for the purposes of Case I of Schedule D. It is, therefore, to that extent, an a fortiori case.

It follows, therefore, that, in my judgment, both the appeals of the taxpayers should be allowed.

Appeals allowed.

Solicitors—*Manches & Co.; Solicitor of Inland Revenue.*

V. A. M.

C. A.
1960
Nov. 3, 4.

Lord Evershed M.R., Harman and Donovan L.JJ.

RYE *v.* RYE.

[1958 R. 826.]

Landlord and Tenant — Agreement — Writing — Whether necessary — Lease of three years or under—Freehold owned by two tenants in common—Whether competent for freeholders to grant lease by parol to themselves—"Conveyance"—Meaning—Whether including oral transactions—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 52, 54, 72 (4), 205 (1) (ii).

In 1942 the plaintiff and his brother became the owners of freehold premises in Golden Square which they held as tenants in common in equity in equal shares. They were then in partnership as solicitors, the profits of the partnership being divided between them in unequal shares. They agreed to transfer their practice to the Golden Square premises, and that the firm should be debited with £500 per annum as rent. That sum was payable to them in equal shares. According to the evidence no definite term or date of commencement was agreed for the tenancy which the plaintiff alleged was then created. His brother having died in 1948, the plaintiff continued to carry on the practice on the premises, first in partnership with the defendant and afterwards alone. After the partnership with the defendant was dissolved, the defendant continued to occupy a room at the premises where he carried on independently the practice of a solicitor. The registered proprietors of the freehold of the premises were the plaintiff and the executors of his deceased brother, of whom the defendant was one. The plaintiff contended that he held the entire premises as a yearly tenant, and he claimed possession of the room which the defendant occupied:—

Held, (1) that a lease for three years or under, although made by parol, must be taken as being a "conveyance" for the purpose of section 72 (4) of the Law of Property Act, 1925,[1] notwithstanding the definition of "conveyance" in section 205 (1) (ii) thereof.

Per Harman J. "Conveyance" so far as it is there defined does require a writing, but the context may "otherwise require."

(2) That, accordingly, it was competent for the plaintiff and his brother, as freeholders, having regard to the provisions of section 72 (4) of the Act, to grant to themselves by parol a lease for a term not exceeding three years.

(3) But that, on the facts, it was not established that a tenancy was created in 1942, and the plaintiff, not having proved a better title to possession, could not eject the defendant.

Decision of Buckley J. reversed.

APPEAL from Buckley J.

The plaintiff, Arthur Lockyer Rye, a solicitor, sought a declaration that the defendant, Ralph Walter Rye, a solicitor, was not entitled to occupy any portion of the premises, No. 11, Golden Square, London, an injunction to restrain him occupying a room in such premises; alternatively, possession of the room in such premises occupied by the defendant.

In 1942 the plaintiff and his brother, Frank Gibbs Rye (hereinafter called "Frank Rye"), were carrying on the practice of solicitors in partnership. The plaintiff was entitled to the larger share of the partnership profits. In that year they purchased the freehold of 11, Golden Square, and they were entitled to such freehold interest in equity as tenants in common in equal shares. In the same year the partnership business was transferred to 11, Golden Square, and it was then agreed that the plaintiff and Frank Rye should pay a rent of £500 a year to themselves as freeholders in equal shares but no definite term for the tenancy was agreed. In 1948 Frank Rye died. The plaintiff continued to carry on the practice of solicitor at 11, Golden Square, and in 1950 took the defendant, who was the son of Frank Rye, into partnership with him. That partnership was dissolved in 1957, but its winding up was not complete. The defendant, after the dissolution of the partnership, continued to occupy a room at 11, Golden Square, where he carried on business as a solicitor on his own account. At the date when the action was brought the plaintiff and the trustees of the will of Frank Rye, of whom the defendant was one, were the registered proprietors of the freehold interest in 11, Golden Square.

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[1] Law of Property Act, 1925, s. 72 (4): "Two or more persons "(whether or not being trustees or "personal representatives) may con"vey, and shall be deemed always "to have been capable of conveying, "any property vested in them to "any one or more of themselves in "like manner as they could have "conveyed such property to a third "party; provided that if the persons "in whose favour the conveyance is "made are, by reason of any fiduciary "relationship or otherwise, precluded "from validly carrying out the trans"action, the conveyance shall be "liable to be set aside."

S. 205 (1): "In this Act unless "the context otherwise requires, the "following expressions have the "meanings hereby assigned to them ". . . (ii) 'Conveyance' includes a "mortgage, charge, lease, assent, "vesting declaration, vesting instru"ment, disclaimer, release and every "other assurance of property or of an "interest therein by any instrument, "except a will; 'convey' has a cor"responding meaning; . . ."

The plaintiff alleged that he was tenant of 11, Golden Square, holding of the freeholders. His tenancy having been originally a tenancy granted to himself and Frank Rye, it had vested in himself as survivor. He further alleged that since Frank Rye's death he had paid half the rent of £500 to his executors. The defendant denied that the plaintiff was entitled to sole possession of 11, Golden Square.

Buckley J., in his judgment, said: "I have to determine "whether the defendant is entitled, notwithstanding his uncle's "objection, to retain the office room on the first floor at 11, "Golden Square. Mr. Shelford, who appears for the defendant, "puts his case in this way. He says that he admits there was "this arrangement between Mr. Frank Rye and the plaintiff "about £500 a year being provided out of the profits of the "partnership and paid in equal shares, but that could not create "any legal tenancy as it would have done had the payers and the "receivers of the money been strangers to one another, because "the two brothers were both the freeholders and occupiers of the "property and the arrangement was merely an accounting "adjustment between them for the purpose of adjusting their "partnership accounts. He has referred me to section 72 of the "Law of Property Act, 1925. [His Lordship read section 72 (4) "of the Act of 1925, and continued:] At first glance that would "appear to be against Mr. Shelford's client's interest, because "it is saying—translating it into the terms of this particular "story—that Mr. Frank Rye and the plaintiff could convey "and shall be deemed to have been capable of conveying this "property to themselves in just the same way as if they had been "strangers, but, says Mr. Shelford, when you turn to the definition of conveyance in section 205 (1) of the Act you find this: "'(ii) "Conveyance" includes a mortgage, charge, lease, assent, "'vesting declaration, vesting instrument, disclaimer, release

" 'and every other assurance of property or of an interest therein " 'by any instrument, except a will.' He says that upon its " true construction that definition says that conveyance only " extends to transactions of the kind mentioned in the sub- " paragraph which are effected by an instrument. The sub-para- " graph goes on to say: ' "Convey" has a corresponding " ' meaning.' Therefore, he says that under section 72 (4), anyone " conveying property to himself must do so by instrument, " because it is only under this instrument that he can find any " power to convey property to himself, create a legal estate in " himself, and he says 'convey' in this Act may be translated " 'effected by an instrument.'

" On the other hand, Mr. Walton says that this is miscon- " struing the definition clause, and that the words 'by any " 'instrument' only qualify the preceding words 'every other " 'assurance of property or of an interest therein.' I think that " is the right construction of the paragraph, for I see no gram- " matical reason why the phrase 'by any instrument' should be " treated as governing all the words that precede it in the " paragraph. It is to be noted that this definition of 'convey- " 'ance' says that it 'includes' all these things; it does not say " that it 'means' any of these things. It includes 'mortgage'— " I think that means a mortgage whether made by instrument, " or not—and it includes a lease, a disclaimer, or a release. Some " of those would be transactions which would be bound to be " made by an instrument, but some, such as a disclaimer, for " instance, could be made without any writing, and I see no " reason to treat the words 'by any instrument' as controlling " those words in the definition. I think they only control the " phrase 'and every other assurance of property or of an interest " 'therein.'

" If that is the right view, I think that the result of the " transactions, which took place during the life of Mr. Frank Rye, " was such as to create a yearly tenancy at £500 a year between " the two brothers as freeholders and the two brothers as partners, " capable, of course, of being determined on proper notice, but " there is no suggestion, if there is any tenancy here, that it has " ever been determined. On the death of Mr. Frank Rye or on " the earlier determination of the partnership between him and " the plaintiff (it was a question in dispute at the date of his " death whether there had been a dissolution, or not), that " tenancy, in my judgment, formed one of the assets of the " partnership.

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Rye v. Rye.

"The partnership having been dissolved and the plaintiff being "the sole survivor of the partnership and in possession of the "assets of the partnership, he must, in my opinion, be treated "as having been carrying on the business of the partnership since "that date for the purpose of the dissolution and all the assets "of the partnership will remain assets of the partnership until "it is wound up and the proceeds distributed between the plaintiff and the estate of his brother in appropriate proportions. In "my view, therefore, the result of the history is that the plaintiff, as the survivor of the two tenants under the tenancy I "have referred to, is entitled to this house so long as that yearly "tenancy continued, and while he is entitled to occupy the house "under the tenancy he is obviously entitled to complain at anybody else trespassing on the property. Therefore, in my view, "the result of this action is that the defendant is not entitled "to remain in occupation of the room on the first floor which "he has occupied since his father's death and the plaintiff is "entitled to relief."

Buckley J. made a declaration that the defendant was not entitled to use and occupy any part of 11, Golden Square.

The defendant appealed.

T. M. Shelford for the defendant, the appellant. The plaintiff seeks to establish that a joint tenancy was created by himself and Frank Rye of the Golden Square premises in their own favour as partners and that such tenancy is now vested in himself as the surviving joint tenant, the tenancy being part of the partnership assets. The defendant's first submission is that, on the evidence, there was never any intention to create a tenancy but merely an agreement to occupy the premises for the purposes of the partnership. The so-called "rent" was merely an arrangement for the adjustment of the partnership profits. Secondly, the plaintiff and Frank Rye could not grant a tenancy to themselves. Before two persons can grant a tenancy to themselves there must be an agreement. They cannot agree with themselves: *Heastie (Inspector of Taxes)* v. *Veitch.*[2] All the reported cases in which a tenancy has been inferred have been cases where some person was in possession of someone else's land paying a yearly rent which was accepted. In those cases there had either been a bargain to grant a lease or a lease had been granted which for some reason was invalid. There is no case where a person was in occupation of his own property paying a sum to himself and he has been held to have granted a lease to himself.

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[2] [1934] 1 K.B. 535; 18 T.C. 305, C.A.

Under section 72 (4) of the Law of Property Act, 1925, a man can grant a lease to himself and another. The section does not empower a man to grant a lease to himself alone or two partners to grant a lease to themselves alone. *Grey* v. *Ellison*[3] is an example of the effect of a man purporting to grant a lease to himself. Before the Law of Property Act, 1925, was passed, a man could not covenant with himself and a third person. A man still cannot covenant with himself alone. He cannot covenant to pay rent nor could he have covenanted to render rent service to himself. He cannot sue himself.

If the implication from the facts is that there was an agreement to grant a tenancy, the agreement was a nullity. Before 1926, if a man covenanted with trustees to keep up a policy of assurance and he was one of the trustees, the covenant was held to be a nullity. There was no equitable remedy in such a case, since the covenant was void ab initio and no equity could arise under it: *Ellis* v. *Kerr*.[4] Even if there were a document purporting to create a tenancy, it would not have any enforceable covenants. Any leasehold interest created would be forthwith drowned in the freehold reversion.

Assuming that a tenancy could have been granted by virtue of the provisions of section 72 (4), it could not have been granted orally. A grant of a tenancy cannot be implied where persons are occupying their own property. Having regard to the definition of "conveyance" in section 205 of the Act, for there to be a conveyance for the purpose of section 72 (4) there must be an instrument in writing. The definition of "conveyance" in the Act of 1925 has extended the meaning of conveyance which was defined in section 2 (v) of the Conveyancing Act of 1881 to include an instrument not under seal. Buckley J. in his judgment attached importance to the fact that a mortgage or a disclaimer need not be in writing, and so he held that the phrase "by any "instrument" in section 205 (1) (ii) did not apply to "convey- "ance" but only to "every other assurance of property." That is begging the question. A mortgage by deposit of title deeds would not be a conveyance within section 205 (1) (ii). But that section is not a complete definition. It says that "'conveyance' "includes." An oral tenancy is not within the definition of conveyance in section 205.

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[3] (1856) 1 Giff. 438.

[4] [1910] 1 Ch. 529.

R. Walton for the plaintiff, the respondent. It is submitted: (1) Since the Law of Property Act, 1925, was passed, two persons can under the power conferred by section 72 (4) validly convey property to themselves, and they can grant orally to themselves a tenancy which falls within section 54 (2) of the Law of Property Act, 1925. (2) The plaintiff and his brother, Frank Rye, did in fact demise the Golden Square premises to themselves in fulfilment of an oral agreement to that effect. That demise was a yearly tenancy at an annual rent of £500. (3) That demise gave to the tenants a right to vacant possession as against all third parties. (4) On the death of Frank Rye, the tenancy vested in the plaintiff as survivor. (5) On its transfer, the fee simple reversion vested in the registered proprietors subject to the plaintiff's tenancy. The plaintiff is entitled to possession against the defendant, whose only right in the premises is as one of the registered proprietors of the reversion.

The plaintiff's first proposition that two persons can convey to themselves depends upon the meaning of "convey" in section 72 (4). "Conveyance" is defined in section 205 (1) (ii). The phrase "by any instrument" does not govern the earlier words of the definition "mortgage, charge." Any conveyance which can be effected orally is included in the definition. Section 72 (4) should be contrasted with section 81 which deals with covenants. Section 52 settles the point, since it shows that the Act is dealing also with conveyances which do not need to be in writing. If section 52 (2) is read with the definition in section 205 (1), it is clear that there may be conveyances which are not in writing. Under section 54 (2) a lease may be created orally from year to year. It has never been suggested that a term cannot begin from the day on which a lessee goes into possession. That an oral lease is within the definition of conveyance accords with the judgment of Jenkins L.J. in *Wright* v. *Macadam.*[5] His judgment shows that there is no distinction between an oral and a written tenancy. Jenkins L.J. there attached no importance to written as opposed to oral agreements.

The plaintiff's second proposition is that in fact the plaintiff and Frank Rye agreed to grant a tenancy to themselves. If the court does not accept the submission that there was a prior arrangement to grant a tenancy, a tenancy was in fact granted: *Lace* v. *Chantler*[6]; *Doe* d. *Rigge* v. *Bell.*[7] A valid demise must have a definite date of commencement of the term granted. The fact that the actual date when a term started has been forgotten does not affect the validity of the term. There was here a yearly tenancy. That can be inferred here from the fact that the rent payable was a yearly rent. The plaintiff as tenant of the premises is entitled to possession as against the defendant.

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[5] [1949] 2 K.B. 744; [1949] 2 All E.R. 565, C.A.

[6] [1944] K.B. 368; 60 T.L.R. 244; [1944] 1 All E.R. 305, C.A.

[7] (1793) 5 Term Rep. 471.

LORD EVERSHED M.R. stated the facts and continued: The first thing that springs to the mind of anybody concerned with this case is its extreme artificiality; for here the landlords and the tenants, if they be tenants, are the same two persons. It is, therefore, a case in which the plaintiff must establish that the two owners of the premises did grant an oral tenancy to themselves as tenants. Before the passing of the Law of Property Act, 1925, the proposition would have met with insuperable difficulties. But the first point that fell to be decided was whether it is now competent for a man to grant to himself, effectively in law, a tenancy of his premises by parol. The definition section in the Law of Property Act, 1925, at first sight at any rate, seems to support the contention of the defendant that anything which can be called a conveyance must be in writing. Section 205 (1) (ii) reads: " 'Conveyance' includes a mortgage, " charge, lease, assent, vesting declaration, vesting instrument, " disclaimer, release and every other assurance of property or of " an interest therein by any instrument, except a will." It was the contention of Mr. Walton that, particularly having regard to the insertion of a comma after the word " disclaimer " and before the word " release," the words " every other assurance of pro- " perty or of an interest therein by any instrument " did not have the effect that an instrument was required in the case of the earlier catalogue (" mortgage, charge," etc.). As a matter of English, I find that argument difficult to accept, but I think nonetheless upon this point, as Buckley J. thought, that Mr. Walton's contention should be sustained, for this definition is not in terms exclusive or exhaustive. It reads: " 'Conveyance' " includes " etc. If you go back to sections 52 and 54 it is manifest that operations, if I may use a neutral word, which are there called conveyances need not be operations evidenced by writing. Section 52 (1) states: " All conveyances of land . . . are " void for the purpose of conveying or creating a legal estate " unless made by deed." But then subsection (2) states that the section does not apply, among other things, to " disclaimers " made in accordance with " a section of the Bankruptcy Act, 1914, "or not required to be evidenced in writing." Again in paragraph (*d*) of the same subsection you find: "leases or "tenancies or other assurances not required by law to be made in "writing." Section 54 moreover shows quite plainly that it is competent to grant by parol a lease taking effect in possession for a term not exceeding three years.

You then come, upon this part of the case, to section 72 (4) which states: "Two or more persons . . . may convey, and "shall be deemed always to have been capable of conveying, "any property vested in them to any one or more of themselves "in like manner as they could have conveyed such property to "a third party." In light of those provisions of the statute, I am content to accept, certainly for the purposes of this judgment, that Mr. Walton is entitled to say that it was competent for the plaintiff and Mr. Frank Rye to grant to themselves by parol a lease of 11, Golden Square, for a term not exceeding three years, that is a lease from year to year. That was the view of Buckley J. and I accept it.

The fact, however, that such a strange operation is now within the contemplation of conveyancing, as the statute has enlarged it, does not of course derogate from the fact that such a transaction as a conveyancing operation is highly artificial; for it is not in doubt that though you may create a term in favour of yourself, you cannot therein create or make any covenants or contracts which are enforceable, and I venture to think that circumstance is not irrelevant in turning to the next point which has to be considered. The matter was put with his usual clarity by Mr. Walton in the form of a proposition. He said that as a fact the proper conclusion here was that a demise was in truth made by the plaintiff and Frank Rye to themselves in the year 1942 in fulfilment of an oral agreement to that effect which was made at the same time. The defendant here is in possession, being one of the joint freehold owners and is entitled to say: if you have a better title to possession than I have, you must establish it. There is a strange paucity of evidence. There is not only no evidence of the state of the register at the relevant time, but there has been no evidence of any partnership documents or entries or notes of any kind. Subject to what is said hereafter there is no direct evidence of any "rent" payments —no entries in any books showing dates, etc.—save only a general statement by the plaintiff that such payments were made at some time or times. [His Lordship reviewed the evidence and continued:] What is the proper conclusion to be drawn from the evidence? Buckley J. came to the conclusion that the true inference from the facts, including the fact of possession by the firm plus some payments of £500 a year, was that a tenancy had been created from year to year, the landlords being the two brothers, the plaintiff and Frank Rye, as freeholders, and the lessees or tenants the same two gentlemen as partners. As Mr. Walton has pointed out, it is no doubt generally true to say that if a lease be granted or purported to be granted which for some reason is void or fails in effect as such, then, if the intending lessee has gone into possession and paid rent which is accepted, there will arise a tenancy and prima facie, where the rent is an annual rent, a tenancy from year to year. That is the inference to be drawn from the evidence in such a case as I have stated. In this case the evidence is in some respects quite unusual and in others extremely defective. In the first place the particulars contain the phrase "no definite time agreed." The most striking and significant defectiveness in the evidence consists to my mind in this. Nowhere does it appear from what date the alleged tenancy began and what was the year, if there was a year to year tenancy. I will read again the short passage from the particulars: "When the firm of Rye & Eyre moved into this "building in January 1942"—and I pause to note that month and to refer to the fact that according to the pieces of paper attached to the cheques the annual rent was said to be due on Lady Day—"my brother and I mutually agreed that the firm "of Rye & Eyre should pay £500 per annum exclusive as the "rent of No. 11, Golden Square, but there was no definite time "agreed." It will be noted that it is not there said in terms that the agreement was that there should be a tenancy granted, and it is also most significant that no time was agreed. When the matter is judged against the artificial background to which I have alluded, I should have thought myself that the real inference was that these two brothers, then partners in amity together, were saying no more than this: "Bearing in mind that our "interests in the freehold differ from our interests in the partner-"ship, we will treat the partnership as our tenants at £500 a "year. That figure will be paid over from the partnership moneys "to us and divided equally between us." Nothing more than that and nothing more than that, indeed, was required. If that conclusion is right, then I feel compelled further to conclude that, in answer to the defendant's allegation that there he is in possession, the plaintiff has not here sufficiently proved a better title.

It is a narrow point and I differ with reluctance from Buckley J., who felt that the facts did justify the inference which he drew. Perhaps this court must act in these matters rather more strictly but, as a matter of fact, I cannot think that the evidence is sufficient to establish such a tenancy as the plaintiff must establish to show a better right to possession than the defendant, and on that narrow ground, therefore, I would allow this appeal.

Harman L.J. I agree, but I desire to add a word because I differ from Buckley J. in his line of reasoning on the construction of section 205. It seems to me that " conveyance " so far as defined in section 205 (1) (ii) of the Law of Property Act, 1925, does require a writing: I do not agree with the judge that the words " every other assurance of property or of an interest therein " by any instrument " only apply to " release." I think that they apply to all the words in that subsection. There is no grammatical reason why they should not. It would be right to put a comma after every word which is not joined to the next by the word " and " and not put a comma before " and." If " other " does not mean what I think it means, then it should be written " every " assurance of property " and so forth. But, as has been pointed out, this is not an exhaustive definition. It says " includes " and it also says " unless the context otherwise requires." If one looks back to sections 52 and 54, I agree that in that context it is required that a letting for three years or under must be taken as being a conveyance although made by parol. I concur, therefore, in the result reached by my Lord that (notwithstanding the terms of the so-called definition in section 205) the context may " otherwise " require " and a " conveyance " may be made by parol.

As to the other matter, it seems to me that the evidence went no further than this: that these two brothers agreed that the partnership should be treated as their tenant as though the partnership were a separate entity, which of course it was not, and that it should pay £500 a year rent, but there seems to have been no beginning agreed upon, still less an end.

I think, therefore, that the plaintiff failed, on the facts, to prove his case and has not a good enough title to the property to eject his nephew.

Donovan L.J. I agree and there is nothing I can usefully add.

Appeal allowed with costs.

Solicitors: *Scott & Son; A. L. Rye.*

B. A. B.

In re M. (An Infant).

1960
Nov. 16, 17,
30.

Cross J.

[1960 M. No. 2772.]

Children and Young Persons—Care of—Child received into care by local authority—Child boarded out under statutory agreement—Refusal of foster-mother to deliver up child to local authority—Child made a ward of court on summons issued by foster-mother—Jurisdiction of Chancery Division to consider welfare of child—Children Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 43), *ss.* 1, 2, 13—*Law Reform (Miscellaneous Provisions) Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 100), *s.* 9.

Infant—Ward of court—Jurisdiction—Child in care of local authority—Whether jurisdiction over child—Law Reform (Miscellaneous Provisions) Act, 1949, *s.* 9.

Crown—Prerogative—Statute, application to—Crown as parens patriae—Wardship jurisdiction of Chancery Division—Whether restricted by Children Act, 1948.

On April 13, 1956, a local authority received an illegitimate child into their care under section 1 (1) of the Children Act, 1948,[1] on the ground that he had been abandoned by his mother, and on the same day arranged for him to be boarded out with Mr. and Mrs. X, in whose care he had been for some two years, who signed an undertaking to return him to the local authority if requested. Mr. X died on April 1, 1957. In October, 1957, the local authority resolved under section 2 of the Act of 1948 that all the rights and powers of the mother be vested in them. In June, 1960, the local authority formed the view that the boarding out of the child with Mrs. X was not in his best interests and asked her to return the child to them. She refused to do so on the ground that she had always cared for him and that it was not in his best interests that he should be removed from her. On August 26, 1960, the local authority issued a summons for an order of habeas corpus originally returnable on October 3, 1960, but adjourned until October 19, 1960, to enable Mrs. X to apply for legal aid and to file evidence

[1] Children Act, 1948, s. 1: " (1) " Where it appears to a local authority with respect to a child in their " area appearing to them to be under " the age of seventeen—(*a*) that he " has neither parent nor guardian or " has been and remains abandoned by " his parents or guardian or is lost " . . . it shall be the duty of the " local authority to receive the child " into their care under this section. " (2) Where a local authority have " received a child into their care under " this section, it shall, subject to the " provisions of this Part of this Act, " be their duty to keep the child in " their care so long as the welfare of " the child appears to them to require " it . . ."

S. 2 (1): " Subject to the provisions " of this Part of this Act, a local " authority may resolve with respect " to any child in their care . . . in " whose case it appears to them— . . . " (*b*) that a parent or guardian of his " (hereinafter referred to as the person on whose account the resolution " was passed) has abandoned him . . . " that . . . all the rights and powers " of the person on whose account the " resolution was passed, shall vest in " the local authority."

in answer. On October 14, 1960, Mrs. X issued a summons under section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949,[2] as a result of which the child became a ward of court. On October 19 the habeas corpus application was adjourned generally.

On a summons issued by the local authority on October 21, 1960, for an order that the child should cease to be a ward of court:—

Held, that the facts that the local authority had all the rights of the mother and that Mrs. X had signed the undertaking did not in themselves preclude the court from exercising the jurisdiction delegated to it by the Sovereign as parens patriae to inquire into the well-being of a child in the care of a local authority, but that the Children Act, 1948, which made express provision for a child passing out of the care of a local authority in certain prescribed circumstances, by necessary implication restricted the prerogative of the Crown; and that, therefore, since the local authority had acted within the powers conferred on it by the Act of 1948, the court had no right to inquire into the wisdom of their decisions. Accordingly, the child should cease to be a ward of court.

In re A. B. (An Infant) [1954] 2 Q.B. 385; [1954] 3 W.L.R. 1; [1954] 2 All E.R. 287, D.C. applied.

ADJOURNED SUMMONS.

On August 23, 1960, Buckley J., sitting as a vacation judge in the Queen's Bench Division, gave leave to a local authority to issue a summons of habeas corpus directed to the foster-mother with whom an infant had been boarded out by the local authority. The summons was originally returnable on October 3, 1960, but it was adjourned to October 19, 1960, to enable the foster-mother to apply for legal aid and to file evidence in answer. As a result of a summons issued in the Chancery Division on the application of the foster-mother on October 14, the infant became a ward of court. On October 19 Salmon J., in the Queen's Bench Division, adjourned the habeas corpus proceedings generally to enable a judge of the Chancery Division to deal with the matter. On October 21 the local authority issued a summons for an order that the infant should cease to be a ward of court.

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[2] Law Reform (Miscellaneous Provisions) Act, 1949, s. 9: "(1) Subject "to the provisions of this section, "no infant shall be made a ward of "court except by virtue of an order "to that effect made by the court. "(2) Where application is made for "such an order in respect of an "infant, the infant shall become a "ward of court on the making of the "application, but shall cease to be a "ward of court at the expiration of "such period as may be prescribed "by rules of court unless within that "period an order has been made in "accordance with the application. (3) "The court may, either upon an application in that behalf or without such "an application, order that any infant "who is for the time being a ward "of court shall cease to be a ward of "court."

The summons was heard in chambers and adjourned into open court for judgment.

Cur. adv. vult.

F. P. Neill for the local authority.

John May for the foster-mother.

November 30. CROSS J. read the following judgment. This is an infant case but as it raises a point of some general importance I am giving my judgment in open court. The child, who is illegitimate, was born on July 10, 1952. In August, 1954, when he was about two years old, his mother brought him to the house of a Mr. and Mrs. X and asked Mrs. X if she knew where she could get lodgings. Mrs. X told the mother that if she cared to trust her she would look after the child for her for a few days while she looked for a house where she and her child would be accepted. The mother said that she would do this and left her child with Mrs. X, who had a number of young children of her own. The mother never reclaimed her child from Mrs. X but visited him from time to time. Mrs. X last saw the mother in March, 1955, in the maternity ward of a hospital where she had had another child, and she has heard nothing of her since April, 1955, when she had a letter from her. In April, 1956, Mrs. X told her local authority that she was looking after a child who had been abandoned by his mother, and the local authority thereupon put the machinery of the Children Act, 1948, into operation with regard to him.

I must now refer to some of the sections of the Act and some regulations made under it. Section 1 (1), so far as relevant, provides that where it appears to a local authority that a child in their area appearing to them to be under the age of 17 has been abandoned by his parents (which in this case of an illegitimate child means the mother: section 59 (1)), and that the intervention of the local authority is necessary in the interests of his welfare, it shall be the duty of the local authority to receive the child into their care. Subsection (2) provides that where a local authority have received a child into their care it shall be their duty, subject to the provisions of the first part of the Act, to keep the child in their care so long as his welfare appears to them to require it and the child has not attained the age of 18. Subsection (3), so far as relevant, provides that the local authority are not to keep the child in their care if any parent or guardian wishes to take over his care, and subsection (4) provides that where the child in question is ordinarily resident in the area of another local authority, that authority shall take over his care. Section 2 of the Act enables the local authority, when it appears to them (inter alia) that the child has been abandoned, to resolve that all the rights and powers of his parents or parent shall vest in them. Section 7 provides that where a child in the care of a local authority under section 1 of the Act is a child for whose welfare the Minister of Pensions is responsible, that Minister may at any time require that the care of the child shall be transferred to him and thereupon the child shall cease to be in the care of the local authority. Similarly, section 8 provides that if the child becomes subject to the Mental Deficiency or Lunacy and Mental Treatment Acts, he shall thereupon cease to be in the care of the local authority. Section 13 provides that a local authority shall discharge their duty to provide accommodation and maintenance for a child in their care so far as is practicable by boarding him out on such terms as to payment by the authority and otherwise as the authority may, subject to the provisions of the Act and regulations made thereunder, determine, and section 14 gives the Secretary of State power to make regulations dealing with the welfare of children boarded out by local authorities under section 13.

Regulations known as the Boarding-Out of Children Regulations, 1955, were made by the Home Secretary on September 1, 1955, and came into operation on January 1, 1956. Regulation 4 provides that a local authority, which has care of a child and has arranged for his boarding out, shall not allow him to remain boarded out with any foster-parents if it appears that the boarding out is no longer in his best interests, and regulation 20 provides that a local authority shall require foster-parents to sign an undertaking in respect of any child boarded out with them in the form set out in the schedule to the regulations. This form includes an undertaking by the foster-parents to allow the child to be removed from their home when so requested by a person authorised by the local authority.

On April 13, 1956, the local authority received this child into their care under section 1 (1) of the Act on the ground that he had been abandoned by his mother, and on the same day in discharge of their duties under section 13 of the Act they arranged for him to be boarded out with Mr. and Mrs. X, with whom he had in fact been living for the past two years. Mr. and Mrs. X signed an undertaking in the form provided by the regulations, including an undertaking to return him to the local authority if requested, and the local authority thereupon began to make payments to them for the child's maintenance. On April 1, 1957, Mr. X died, but the child continued to be boarded out with Mrs. X. In October, 1957, the local authority passed a resolution under section 2 of the Act vesting all the rights and powers of the mother of the child in them. In June, 1960, the local authority formed the view that the boarding out of the child with Mrs. X was no longer in his best interests and asked Mrs. X to return him to them. She refused to do so, notwithstanding the undertaking which she had signed, on the ground that she had always cared for him well and that it was not in his best interests that he should be removed from her charge. On August 23, 1960, Buckley J., sitting as vacation judge in the Queen's Bench Division, gave the local authority leave to issue a summons for an order for habeas corpus returnable for the first available day of this term, and on August 26 a summons was issued which was originally returnable on October 3, 1960, but was adjourned until October 19, 1960, to enable Mrs. X to apply for legal aid and file evidence in answer. Meanwhile, on October 14, 1960, Mrs. X issued a summons in this Division under section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, asking that the child be made a ward of the court and that directions be given by the court with regard to his custody, care and control. As a result of the issuing of this summons the child became a ward of court, and when the habeas corpus application came before him on October 19 Salmon J. adjourned it generally so that a judge of this Division might deal with this matter. Finally on October 21, the local authority issued a summons in these proceedings for an order that the child cease to be a ward and that summons is now before me.

Since the passing of the resolution under section 2 (1) of the Act of 1948 the local authority has had all the rights of the mother of the ward. Further, Mrs. X, the foster-mother, has signed an undertaking to return the ward to the local authority when requested to do so. These facts, however, though they would give the local authority a prima facie right to have the child returned to them, would not in themselves preclude this court from exercising the jurisdiction delegated to it by the Sovereign as parens patriae and considering whether in the particular circumstances it was in the best interests of its ward that he should be taken away from Mrs. X, with whom he has in fact been living for the past six years.

But the question which I have to decide is whether the Children Act, 1948, although not expressed to bind the Crown, does not by necessary implication take away or limit the Crown's right to inquire into the well-being of children who have been taken into the care of a local authority. Counsel for Mrs. X referred me to several cases, such as *Wheaton* v. *Maple & Co.*,[1] to show how reluctant the courts are to hold that a statute not expressed to bind the Crown binds it by implication, and submitted that I ought not to hold that this Act has had the result contended for by the local authority unless I am satisfied that the intention of the legislature to achieve that result is clear and unmistakable. I agree; but, viewing the matter for the moment as free from authority, I think that the provisions of this Act to which I have referred lead inevitably to the conclusion that the prerogative has been restricted. It is not disputed that this child was properly received into the care of the local authority under section 1 (1) of the Act. The Act makes express provision for such a child passing out of the care of the local authority in certain prescribed circumstances. For example, under section 1 (3) the child may pass into the care of a parent or guardian; under section 1 (4) into the care of another local authority, and under section 7 (1) into the care of the Minister of Pensions, but subject to the operation of such special provisions, the statute by section 1 (2) imposes a duty on the local authority to keep the child in their care so long as his welfare appears to them to require it. If this court took upon itself to inquire into the well-being of a child in the care of a local authority, whether the child was boarded out or was in some home run by the local authority, the judge might, theoretically at least, reach the conclusion that the child ought to be removed altogether from the care of the local authority and committed to the care of some other person. But if it made an order to this effect the court would be making it impossible for the local authority to carry out the duty imposed upon it by the Act. Counsel for Mrs. X was disposed to agree that Parliament could hardly have contemplated this possibility, but he argued that even if the court could not make an order removing the child from the care of the local authority there was nothing in the Act to prevent it overruling any given decision which the local authority might take with regard to him and directing them to deal with the child in the way in which the court thought best for his welfare, though they thought otherwise. But for the court to impose on the local authority its view of what is best for the child while leaving the child in the care of the authority would give rise to an intolerable situation which again I cannot think was contemplated by Parliament. Parliament, as I read this Act, thought that children in the situation of this child ought to be taken care of by the local authority and that the local authority could be trusted to do the best for them. So long, therefore, as the local authority is acting within the powers given to it by the Act, this court, as I see it, has no right, let alone any duty, to inquire into the wisdom of its decisions.

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[1] [1893] 3 Ch. 48, 64; 9 T.L.R. 559, C.A.

So far I have dealt with this case apart from authority, but in fact the Act was construed in substantially the same way as I would construe it by a Divisional Court of the Queen's Bench Division in habeas corpus proceedings reported under the title *In re A. B. (An Infant).*[2] Counsel for Mrs. X, as well as reserving his right to contend in a higher court that that case was wrongly decided, submitted that it was not binding on me. His main ground for so submitting was that in habeas corpus proceedings relating to an infant the court has not so wide a jurisdiction to inquire into what is for the child's welfare as it has if the child is a ward of court; that therefore the Divisional Court did not need to express the views about the statute which it did express, and that what the judges said were merely dicta. I do not agree with this submission. Whatever may have been the position in the past, since the Judicature Acts a judge in habeas corpus proceedings concerning an infant considers the matter exactly as though he was exercising the Chancery jurisdiction over wards of court (see *Reg.* v. *Gyngall* [3]), and I do not think that the Law Reform (Miscellaneous Provisions) Act, 1949, which altered the procedure in wardship cases in this Division, has altered the general position in any way. As a subsidiary ground for his submission that the construction put on the Act by the Divisional Court was not binding on me, counsel relied on the fact that various authorities to which he referred me, showing the reluctance of the court to hold that the prerogative of the Crown has been impliedly cut down by a statute, do not appear to have been cited in the Divisional Court. But the Divisional Court had the point at issue plainly put before them, and the fact (if it be a fact) that some authorities bearing

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[2] [1954] 2 Q.B. 385; [1954] 3 W.L.R. 1; [1954] 2 All E.R. 287, D.C.

[3] [1893] 2 Q.B. 232; 9 T.L.R. 471, C.A.

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M. (AN INFANT), *In re.*

CROSS J.

on it were not cited cannot make the decision not binding on me, if it would otherwise be binding. I think, therefore, that even if I had myself been inclined to take a different view of the effect of the Act, I should have been bound to adopt the construction which the Divisional Court put upon it. In fact, however, I respectfully agree with their view of the matter.

In the result, therefore, I shall direct that this child ceases to be a ward of court.

Order accordingly.
Order for taxation of defendant's costs.

Solicitors: *Sharpe, Pritchard & Co. for T. H. Parkinson, Birmingham; Preston, Lane-Claypon & O'Kelly for Southall & Co., Birmingham.*

M. G. T.

1960
March 29;
April 5, 6, 7, 8, 11;
May 19.

CROSS J.

WINDSOR REFRIGERATOR CO. LTD. AND ANOTHER *v.* BRANCH NOMINEES LTD. AND OTHERS.

[1958 W. No. 1431.]

Deed—Execution—Escrow—Undated—Revocable instructions to agent of grantor—Appointment of receiver—Appointment not intended to become binding until instructions complied with—Validity—Whether delivered as an escrow—Whether undelivered deed—Whether effective instrument under hand.

Practice—Preliminary point—Validity of deed of appointment—Whether procedure appropriate.

A debenture issued by a company on April 30, 1946, to secure a bank advance, contained a condition that at any time after the principal moneys thereby secured became payable, the registered holder of the debenture might by writing appoint a receiver. On the same day an agreement was made between the company, the bank, and the debenture holders, which provided that the debenture holders should hold the debenture and the moneys secured thereby on trust for the bank as a continuing security, and subject thereto on trust for the company, and that the debenture holders might at the request of the bank at any time thereafter in case of default in payment of the sum secured on demand, exercise the power to appoint a receiver. Two further debentures were issued accompanied by similar agreements.

On February 24, 1958, the advance department of the bank asked the debenture holders to prepare a formal demand for payment of the total sum due under the debentures and a letter authorising I., the branch manager of the bank, to receive payment: on the same day, or early on the following day, an instrument appointing G. as receiver was sent with a request for its sealing by the debenture holders. On February 25 the instrument of appointment was sealed and signed by two of the directors of the debenture holders, but the date was left blank. A formal demand for payment and a letter to the secretary of the company authorising I. to receive payment were also prepared and signed on behalf of the debenture holders. The advance department sent the instrument, the formal demand and the letter to I., instructing him to present the demand and the letter personally at the company's registered office, that, failing immediate payment, the instrument of appointment should be handed to G., and that he was to settle beforehand with G. the amount of G.'s remuneration. On the morning of February 28, I. inserted that date in the instrument of appointment and went with G. to the company's office, where he handed the demand and the letter to the managing director. After a discussion G. entered the office; I. stated that G. was to be appointed receiver and gave him the instrument and G. then gave the director a letter dated February 28 in which he stated that he had been appointed receiver under the debentures. The company and the managing director claimed a declaration that the appointment of G. was invalid.

On the trial of the preliminary point of law, whether the above procedure was invalid to effect the appointment of G. and on the assumption (made by the court on the construction of the particulars of the defence) that, if the instrument of appointment was delivered at all on February 25 it was delivered subject to the conditions: (1) that G. agreed to act on acceptable terms; (2) that a demand for payment was made by I. and not complied with; (3) that I. dated the deed; and (4) that I. handed the deed to G. after the demand was made and not complied with, and on the further assumption that I. was acting as an agent for the debenture holders, and that his instructions could have been countermanded at any time:—

Held, (1) that the carrying out of revocable instructions could not be regarded as conditions of delivery of a deed by the grantor, for there was an overriding power in the grantor to recall the deed altogether, so that the instrument of appointment of G. as receiver could not be regarded as having been delivered as an escrow, but was merely an undelivered deed, with the result that I., the agent of the debenture holders, should have been authorised by them by deed to deliver it when he had carried out his instructions (post, p. 100).

Dictum of Vaughan Williams L.J. in *Foundling Hospital* (*Governors and Guardians*) v. *Crane* [1911] 2 K.B. 367, 374–375, C.A. applied.

Eccles v. *Bryant* [1948] Ch. 93; [1947] 2 All E.R. 865, C.A. distinguished.

(2) That the instrument of appointment could not be treated as an appointment under hand complying with the conditions of the debenture since the directors, in signing the instrument, must be taken to have been witnessing the affixing of the seal and nothing

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Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd.

else. The appointment of G. as receiver, accordingly, was invalid (post, p. 104).

Per curiam. The trial of the issue as a preliminary point of law was an unsuitable procedure since it required facts to be assumed by construction of the defence and particulars, and there had been no opportunity to hear the evidence of the directors of the debenture holders (post, p. 99).

Preliminary points of law set down for hearing before trial.

The following statement of agreed facts is taken substantially from the judgment: The Windsor Refrigerator Co. Ltd., the plaintiff, had an account at the Reading branch of the National Provincial Bank Ltd., the second defendants (hereinafter called "the bank"). The defendants, Branch Nominees Ltd., the debenture holders, were a wholly-owned subsidiary of the bank, and securities given to the bank to secure advances were commonly taken in the name of and issued to the debenture holders as trustees for or nominees of the bank. The functions of the debenture holders in that regard were carried out as part of the department of the bank known as "the security department," while control and superintendence of advances made by the bank through its various branches by way of overdrafts or otherwise were exercised by the department of the bank known as "the advance department." The advance department had therefore control and superintendence of the company's account with the bank at its Reading branch.

On April 30, 1946, the plaintiff company issued under the seal of the company a debenture in common form, containing a promise by the company to pay to the debenture holders on demand the sum of £3,000 with interest at 5 per cent. per annum, and a floating charge on all the property of the company to secure the payment of capital and interest. The debenture was issued subject to and with the benefit of the conditions endorsed on it. Condition 12 (1) was in the following terms: "At any time after "the principal moneys hereby secured shall have become pay-"able the registered holder of this debenture may at any time "appoint by writing any person or persons to be a receiver or "receivers of the property charged by this debenture and may "from time to time by writing remove any receiver so appointed "and appoint another in his stead." Sub-paragraphs (2), (3) and (4) of paragraph 12 contained the usual provisions with regard to the powers, duties and remuneration of any receiver so appointed.

On April 30, 1946, the same day as the debenture was issued, an agreement (called a " Buckley agreement ") was made between the company, the bank and the debenture holders. Clause 1 of that agreement provided that the debenture holders, therein described as " the trustees," should stand possessed of the debenture and the money secured by it on trust in the first place as a continuing security for payment by the company to the bank on demand of all moneys owing by the company to the bank and, subject to such trust in favour of the bank, on trust for the company. Clause 2 provided that it should be lawful for the debenture holders, at the request of the bank at any time thereafter in case of default in payment of such sum or sums or any part thereof on demand, to exercise all and every or any of the powers vested by the debenture in the holders thereof, including (inter alia) the power to appoint a receiver, and that the debenture holders should execute all such assurances and do all such acts as the bank should require or think proper.

On December 11, 1947, and January 31, 1951, similar debentures for securing sums of £2,000 and £5,000 respectively were issued by the company to the debenture holders, accompanied in each case by similar agreements between the company, the bank and the debenture holders.

On February 24, 1958, the advance department of the bank, by a memorandum in writing, requested the debenture holders to prepare a formal demand for payment of the full amount of £10,000 owing by the company under the three debentures, and a letter authorising Noel David Inkin or Vernon Penrose Hobby, the manager and senior clerk of the Reading branch of the bank, to receive payment of that sum on behalf of the debenture holders.

On the same day, or early on the next day, the advance department sent to the security department an instrument of appointment of Philip Clarkson Greenwood, the third defendant, (hereinafter called " the receiver ") as receiver under the debentures, with a request in writing for its sealing by the debenture holders. That document was in the following terms: " We, " Branch Nominees Limited, being the registered holders of the " debentures referred to in the schedule hereunder written and " under and in accordance with the provisions of the conditions " endorsed upon the said debentures and all other powers us " enabling, hereby appoint Mr. Philip Clarkson Greenwood, " A.C.A., to be receiver of the undertaking and all of the property " and assets of Windsor Refrigerator Co. Ltd. comprised in and "charged by the said debentures upon the terms and with and "subject to the powers and provisions contained in the said "debentures, and we declare that the said receiver shall be "entitled to remuneration at the rate already arranged between "us and the said receiver or at such higher rate not exceeding "5 per cent. as shall or may from time to time be agreed by us "with him as witness our common seal this —— day of —— "1958." The schedule contained details of the three debentures.

At about 10 o'clock in the morning of February 25, the common seal of the debenture holders was affixed to that instrument of appointment in the presence of two of the directors of the debenture holders, who signed their names in the space provided for the purpose on the instrument, but the date was left blank. The debenture holders thereupon returned the instrument so sealed to the advance department, together with a formal demand for payment by the company to the debenture holders of £10,000, signed by a director, and a letter to the secretary of the company, also signed by a director, authorising the manager or the senior clerk of the Reading branch to receive payment of the £10,000 on behalf of the debenture holders.

On the same day, the advance department of the bank sent the instrument of appointment and the two letters to the bank manager, together with a letter in the following terms: "In "reply to your letters of the 19th and 21st instant, the directors "desire you to call up the debt and guarantees and we confirm "our recent telephone conversation to this effect. They have "appointed Mr. Philip Clarkson Greenwood, A.C.A., to act as "receiver and have transferred the account to realisation section, "who will instruct you further in due course. A formal demand "by Branch Nominees Ltd. for payment of the amount due under "the debentures is enclosed, together with a letter from Branch "Nominees Ltd., authorising Mr. Noel David Inkin or Mr. Vernon "Penrose Hobby to receive payment. It is essential that these "should be presented personally by Mr. Inkin or Mr. Hobby at "the company's registered office and he should take with him the "debentures so as to produce them in case of need. Failing "immediate repayment, you may then hand the enclosed deed of "appointment to Mr. Philip C. Greenwood. As you are no doubt "aware, the deed of appointment requires to be stamped 10s., "and realisation section should be advised of the date inserted "by return of post in order that the necessary notice may be "filed with the registrar of joint stock companies within the "prescribed period of seven days. We should like you to discuss "and settle beforehand with Mr. Greenwood the question of his "remuneration as receiver and in this connection we consider "that 5 per cent. on realisations would be a reasonable scale, "but in the event of its being necessary for the receiver to "employ agents for the disposal of the assets and commissions, "fees, etc., have to be paid to such agents, then the amount "payable to the receiver in respect of such realisations should be "2½ per cent. only. We return the debentures totalling £10,000, "Buckley agreements and certificates of registration, receipt of "which kindly acknowledge."

On February 26, the bank manager, having received this letter and its enclosures, made an appointment by telephone with Harry Fletcher Wood, the second plaintiff, the managing director of the company, to meet him at 11 o'clock on February 28, to discuss the company's account, which was then overdrawn to the extent of £8,032 14s. 9d. At about 10.20 a.m. on the morning of February 28, the bank manager inserted the date "February 28" in the instrument of appointment and went with the receiver to the company's office at Maidenhead, where they arrived at about 11 a.m. The bank manager first saw the company's managing director alone, without the receiver being present. He informed him that he had bad news for him, as the bank required repayment of the company's debt, and handed him the two letters addressed to the company by the debenture holders and requested him to read them, which he did. There then followed a discussion between the bank manager and the managing director which lasted for about 15 minutes, at the end of which the receiver came in and was introduced by the bank manager to the managing director. During the next 10 minutes or thereabouts, a further conversation took place, mainly consisting of an account by the managing director of the difficulties experienced by the company. The bank manager then said: "The fact remains that Mr. Greenwood is to be appointed receiver," and thereupon handed to the receiver the deed of appointment. The receiver then handed to the managing director a letter dated February 28, which he had signed and brought with him, in the following terms: "Dear Mr. "Wood, I wish to inform you that I have today been appointed "receiver of the Windsor Refrigerator Co. Ltd. under a series of "debentures in favour of the bank. You will, of course, appre"ciate that I shall have to be responsible for the running of the "company during my period of office. I trust that with care and "co-operation from all concerned that the company will emerge "from its difficulties and after my release as receiver continue "trading and go from strength to strength. Yours sincerely, "Philip C. Greenwood." The meeting then continued until about 1 p.m.

The plaintiff company issued a writ claiming against the debenture holders, the bank and the receiver, a declaration that the appointment of the receiver was invalid. By the particulars of their defence the defendants stated, inter alia: "(e) The requests "for the preparation of the formal demand and the sealing of the "instrument of appointment were made by the bank (through its "advance department) with the intention thereafter of procuring "the said demand to be served on the company and the said "instrument of appointment to be dated and delivered to Mr. "Greenwood so as to effect his appointment as receiver. The "debenture holders complied with such requests (as they were "bound to under clause 2 of each of the said agreements) in the "knowledge that such was the intention of the bank and in order "to enable such intention to be carried into effect and the bank "had the express or alternatively implied authority from the "debenture holders on their behalf to serve or procure the serving "on the company of the said demand and to date and deliver to "Mr. Greenwood the said instrument or procure the same to be "so dated and delivered. It was not the intention either of the "debenture holders or the bank that the said instrument of "appointment should have any effect until so dated and "delivered." It was further stated in the particulars that the bank manager, in handing to the receiver the deed of appointment, was exercising on behalf of the bank the authority which the bank had from the debenture holders as stated in paragraph (e) above.

On May 27, 1959, the following was ordered to be set down for argument as a preliminary point of law before the trial of the action: Whether the procedure set out above was invalid to effect the appointment by the debenture holders of the receiver on February 28, 1958, by reason of any of the following facts: (1) the debenture holders had sealed on February 25, 1958, an undated instrument of appointment prior to any demand being made on the company for payment of the principal money secured by the debentures or of the sum owed by the company to the bank; (2) the bank sent the instrument of appointment to their branch manager with instructions (a) to demand from the company at their registered office payment of the principal money; (b) to date

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the instrument, and (c) failing immediate payment, to hand the instrument to the receiver; (3) the bank manager on February 28, 1958, inserted that date into the instrument before making a demand for payment; (4) the bank manager on February 28, 1958, made a demand for payment to the company's managing director at its principal place of business and did not receive payment, and (5) the bank manager thereupon handed the instrument to the receiver.

Muir Hunter and *David Graham* for the plaintiffs. The steps taken by the debenture holders were ineffectual to procure the appointment of the receiver, and the purported appointment is a nullity. The act of appointing a receiver is one of importance, since it affects the rights of the mortgagor and of other persons. Its date and effect must be certain and not open to conjecture, particularly since in the case of a company it imposes statutory duties and obligations under the Companies Act, 1948, and creates rights in favour of preferential creditors. The importance attaching to it, and to the exercise of other remedies of incumbrancers, is illustrated by such cases as *Moore* v. *Shelley*[1] and *Kasofsky* v. *Kreegers*.[2] If a prospective appointment is to be made it must be clothed with some solemnity if the person to be appointed is to have the authority of the appointor himself. The debenture holders could have delegated to the bank manager their power to appoint, which, upon default being made, he could have exercised, but such a delegation would need to be made by deed; see section 74 of the Law of Property Act, 1925, sections 32 and 36 of the Companies Act, 1948, and *Powell* v. *London and Provincial Bank*.[3]

The only means of achieving the result sought by the defendants would have been for the company to contract that a receiver might be appointed at any time, even before demand for payment; an appropriate form of instrument is to be found in Key & Elphinstone (15th ed., 1953), Vol. 2, p. 295.

The sealed but undated writing made on February 25, 1958, if to be regarded as having been delivered as an escrow, was made subject to a condition, and on that condition being fulfilled, became irrevocable. If, however, the debenture holders had changed their minds, could they not have recalled the deed? If so, it cannot have been delivered as an escrow, for a deed

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[1] (1883) 8 App.Cas. 285, P.C.

[2] [1937] 4 All E.R. 374, D.C.

[3] [1893] 2 Ch. 555; 9 T.L.R. 446, C.A.

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once delivered cannot be recalled. If the deed was delivered as an escrow there were two essential conditions, neither of which was fulfilled: (1) the receiver should have been prepared to act for remuneration satisfactory to the bank and the debenture holders, and (2) a demand for payment should have been made by the bank manager on behalf of the debenture holders and not complied with by the company before the deed was handed to the receiver.

A deed delivered as an escrow takes effect, when the condition is fulfilled, as from the date of delivery. This deed would therefore relate back, when the condition had been fulfilled, to February 25, when there was no capacity to appoint; the deed is therefore a nullity: see *Thompson* v. *McCullough*,[4] *Foundling Hospital (Governors and Guardians)* v. *Crane*[5]; *Kasofsky* v. *Kreegers*[6]; Williams on Vendor and Purchaser (3rd ed., 1923), pp. 1184–1185.

If the instrument is to be regarded, contrary to its tenor, as made under hand only, it cannot be regarded as escrow, since that doctrine is confined to deeds. The conception of a unilateral conditional appointment of a receiver under hand is inadmissible. [Reference was also made to *In re Wheeler and De Rochow*[7]; *In re Sichel's Settlements*[8]; *Savill Brothers Ltd.* v. *Bethell*[9]; *In re Ellenborough*[10]; Farwell on Powers (3rd ed., 1916), pp. 147 et seq.]

John L. Arnold Q.C. and *L. J. Morris Smith* for the defendants. The appointment was delivered by the debenture holders on February 25 as an escrow, subject to conditions which were fulfilled when the bank manager handed the document to the receiver on February 28. [Reference was made to *Xenos* v. *Wickham*.[11]]

The purpose of the relation back of an escrow is to validate and not to destroy the document. No case exists in which a deed which has been clearly delivered as an escrow is ineffective by reason of a condition precedent to its effectiveness as a deed having occurred after, and not before, its conditional delivery. *Thompson* v. *McCullough*[12] and the *Foundling Hospital* case[13] are distinguishable.

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[4] [1947] K.B. 447; 63 T.L.R. 95; [1947] 1 All E.R. 265, C.A.

[5] [1911] 2 K.B. 367, C.A.

[6] [1937] 4 All E.R. 374.

[7] [1896] 1 Ch. 315.

[8] [1916] 1 Ch. 358.

[9] [1902] 2 Ch. 523, C.A.

[10] [1903] 1 Ch. 697.

[11] (1866) L.R. 2 H.L. 296, H.L.

[12] [1947] K.B. 447.

[13] [1911] 2 K.B. 367.

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At the highest there must, at the time of conditional delivery, be formal capacity to execute a deed; it is not necessary that there should be an estate or power in the person executing. Conditional writings are well known to the law. [Reference was made to *Coare* v. *Giblett* [14]; *Edmunds* v. *Edmunds* [15]; *Jennings* v. *Bragg* [16]; *Butler and Baker's* case [17]; *Perryman's* case [18]; *Goddard's* case.[19]] The doctrine of escrow applies equally to conditional documents under hand. [Reference was made to *Davis* v. *Jones* [20]; *Furness* v. *Meek* [21]; *Pym* v. *Campbell* [22]; *Wallis* v. *Littell* [23]; *Eccles* v. *Bryant* [24]; Sheppard's Touchstone, 7th ed., pp. 58, 61.] Condition 12 of the debenture did not require an appointment to be under seal; under section 74 of the Law of Property Act, 1925, the directors of the debenture holders could have appointed an agent to execute on their behalf a document under hand appointing the receiver. Such an appointment could have been made with the intention that it should not bind the debenture holders unless and until the bank manager had carried out his instructions, and if made with that intention it would have become automatically binding on the debenture holders when the instructions were carried out. [Reference was made to *In re Tahiti Cotton Co.*[25]; *Ortigosa* v. *Brown* [26]; *Pattle* v. *Hornibrook.*[27]]

[Reference was also made to *Hanbury* v. *Bateman* [28]; *Major* v. *Ward* [29]; *Farrar* v. *Farrars Ltd.*[30]; *In re Simms* [31]; Fisher & Lightwood, Law of Mortgages (7th ed., 1931), pp. 406, 407.]

Muir Hunter replied.

Cur. adv. vult.

May 19. CROSS J. read the following judgment: The issue in this action is whether on February 28, 1958, the third defendant, Philip Clarkson Greenwood, [the receiver] was validly appointed by the first defendants, Branch Nominees Ltd. (whom I will call "the debenture holders") to be the receiver of the undertaking and assets of the plaintiff, Windsor Refrigerator Co.

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[14] (1803) 4 East 85.

[15] [1904] P. 362.

[16] (1595) Cro.Eliz. 447.

[17] (1591) 3 Co.Rep. 25a.

[18] (1599) 5 Co.Rep. 84a.

[19] (1584) 2 Co.Rep. 4b.

[20] (1856) 17 C.B. 625.

[21] (1857) 27 L.J.Ex. 34.

[22] (1856) 6 E. & B. 370.

[23] (1861) 11 C.B.N.S. 369.

[24] [1948] Ch. 93; [1947] 2 All E.R. 865.

[25] (1873) L.R. 17 Eq. 273.

[26] (1878) 47 L.J.Ch. 168.

[27] [1897] 1 Ch. 25.

[28] [1920] 1 Ch. 313.

[29] (1847) 5 Hare 598.

[30] (1888) 40 Ch.D. 395.

[31] [1934] Ch. 1, C.A.

Ltd. (whom I will call "the company") under the terms of three debentures granted by the company to the debenture holders.

By an order made in the action on May 27, 1959, by agreement between the parties, it was directed that this issue should be determined by the court as a point of law on the footing that where the facts were in dispute on the pleadings, the version given by the defendants in the relevant paragraphs of their defence and the particulars delivered under it were correct. [His Lordship stated the facts set out above and continued:]

I must now consider whether on these assumptions of fact the receiver was validly appointed receiver on the morning of February 28, 1958. Clause 12 (1) of the conditions endorsed on the debentures provides that a receiver can only be appointed after the principal moneys thereby secured shall have become payable, that is to say, after the debenture holders have demanded payment of them, but I must assume for present purposes that the bank manager had made a demand for payment on behalf of the debenture holders before he handed the deed of appointment to the receiver. A deed, whether executed by a corporation or by an individual, does not necessarily bind the grantor as soon as it is sealed. It only becomes binding when it has been "delivered" by the grantor as his deed, i.e., when the grantor has indicated by words or conduct that he intends the deed which he has executed to be binding on him. The debenture holders, according to the facts which I must assume to be true, did not intend the deed of appointment to become unconditionally binding on them when the seal was affixed to it on the morning of February 25. On the other hand, the deed cannot have been delivered on their behalf by the bank manager when he handed it to the receiver on February 28. The bank manager was not a person who, under the constitution of the debenture holders, had any power to execute or deliver deeds on their behalf and, although a corporation can no doubt appoint a third party as their agent to deliver a deed which they have previously sealed, such an appointment would itself have to be under seal just as would a similar appointment by an individual of an agent to deliver a deed for him: see *Powell* v. *London and Provincial Bank.*[1] The defendants seek to escape from this difficulty in one of two ways. They argue first that the appointment was delivered by the debenture holders on February 25 as an "escrow" subject to conditions which were fulfilled when the bank manager handed the document to the receiver on February 28. Alternatively, if for any reason the appointment cannot be regarded as having been delivered as an escrow, they argue that it should be regarded not as a deed at all but as equivalent to a document under hand.

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[1] [1893] 2 Ch. 555; 9 T.L.R. 446, C.A.

The word "escrow" is sometimes, I think, loosely used to describe a deed which has not been delivered at all. In fact, however, the two things are entirely different. A deed which has not been delivered at all has no effect whatever unless and until the grantor indicates his wish that it shall become binding on him. On the other hand, an escrow—i.e., a deed which is delivered subject to a condition—becomes unconditionally binding, without any further expression of the grantor's will, as soon as the condition is fulfilled. Thus, the death of the grantor renders an undelivered deed forever incapable of having any effect, but it has no effect on an escrow which will become binding on the grantor's estate if and when the condition subject to which it was delivered is fulfilled: see, generally, Norton on Deeds, 2nd ed. (1928), p. 18.

If, then, the appointment of the receiver as receiver was delivered by the debenture holders as an escrow on February 25, what were the conditions subject to which it was so delivered? The defendants argued, in reliance on the wording of the last sentence of sub-paragraph (e) of the particulars which I have set out above, that the only conditions were that the bank manager should date the deed and hand it to the receiver. The plaintiffs, on the other hand, argued that, on the hypothesis that the deed was delivered as an escrow, there must have been two other conditions which had to be fulfilled, namely, (1) that the receiver should be prepared to act as receiver for a remuneration satisfactory to the bank and the debenture holders, and (2) that a demand for payment should have been made by the bank manager on behalf of the debenture holders and not complied with by the company before the deed was handed to the receiver.

The fact that there was this dispute between the parties shows how unsuitable this form of procedure is for the determination of a question of this sort. If I was trying the action, I should presumably have heard the evidence of the directors of the debenture holders. As it is, I have to ascertain the facts to be assumed by construing the relevant parts of the defence and particulars. Construing them as best I can, I think that if this deed can be considered to have been delivered at all on February 25, I must take it to have been delivered subject to the four conditions stated by the plaintiffs and not only to the two stated by the defendants. The argument of the defendants appears to me to attach too much importance to the wording of sub-paragraph (e) and to ignore the realities of the case. It is natural enough that the dating and handing over of the deed should be referred to together in the last sentence of that sub-paragraph, since these were the two things which were to happen to the deed itself as a piece of paper; but, in the absence of any evidence on the point, I cannot infer from the fact that the making of a demand is not mentioned in the same sentence that it was not also a condition on which the deed was delivered. The defendants' argument would apparently involve the consequence that if the bank manager had handed the deed to the receiver to read in the car as they were on their way to the meeting (which, for all I know, he may have done), the deed would thereupon have become unconditionally binding on the debenture holders, and yet would not have effected the appointment of a receiver, since no demand had been made.

I shall therefore proceed on what appears to me to be the common sense assumption that if this deed can be regarded as having been delivered at all on February 25, it was delivered subject to the four conditions to which I have referred, namely: (1) that the receiver agreed to act on acceptable terms; (2) that a demand for payment was made by the bank manager and not complied with; (3) that the bank manager dated the deed; and (4) that he handed it to the receiver after the demand was made and not complied with.

It also appears to be plain on the facts which I have to assume that the bank manager was acting as a mere agent for the debenture holders, and that his instructions could have been countermanded at any moment. If, for example, the bank had suddenly decided not to call in the loan or had thought that the receiver was not a suitable person to be a receiver, and had asked the debenture holders to tell the bank manager to tear up the deed, he would have been bound to obey their directions.

The question which then arises is whether, if a deed is sealed and handed to an agent of the grantor to deal with in a certain way on the footing that it is not to become binding on the grantor until the instructions are fully complied with, and the instructions are revocable by the grantor so long as they are not yet complied with, the deed can be regarded as having been delivered as an escrow. In other words, can the carrying out of revocable instructions be regarded as conditions of a delivery by the grantor, or should such a deed be regarded as not having been delivered at all by the grantor, with the result that the agent must be authorised by deed to deliver it for the grantor when he has carried out his instructions?

The only case cited to me which deals with this point is *Foundling Hospital (Governors and Guardians)* v. *Crane*.[2] There, one H. signed and sealed a document with the date in blank purporting to be an assignment to Mrs. B. of a lease held by him and delivered the document to his solicitors upon terms set out in a letter addressed to him by them as follows: "We acknowledge that you have today executed the assignment of your lease to Mrs. B. as an escrow, and that we are to retain it on your behalf until you send instructions to complete the deed. In the event of your dying before the deed is completed, we understand that we are to consider the deed as having been completed before your death, and to take what steps are necessary to vest the lease in Mrs. B. should she wish it. In the event of Mrs. B. dying before the assignment is completed, you will of course send us further instructions as to what is to be done with the premises." The document was not attested so as to satisfy the requirements of the Wills Act, 1837. H. died without having given any further instructions in the matter but having occupied and retained the title deeds of the house until his death and paid the rent, rates and taxes in respect thereof. The issue in the case was whether the assignment was effectively delivered as an escrow conditionally on H. dying without giving any further instructions, or was merely an undelivered deed having no effect whatever. The Court of Appeal held that it was merely an undelivered deed. The ratio decidendi of the case was that even if the document could otherwise have been regarded as an escrow, the imposition of a condition that it should only take effect on the grantor's death was invalid as an attempt to make a testamentary disposition in a form not authorised by the Wills Act, 1837. + All three members of the court, however, also considered whether, if the condition had been valid, the fact that the solicitor was only to vest the property in Mrs. B. on H.'s death if H. had not given him contrary instructions in the meantime, would have precluded the document from being an escrow ✗ Farwell L.J. and Kennedy L.J. merely doubted whether such a document could be an escrow. Thus, Farwell L.J. said[3]: "I doubt also if a deed can

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[2] [1911] 2 K.B. 367, C.A.

[3] [1911] 2 K.B. 367, 379.

"be delivered as an escrow at all subject to an overriding power "in the grantor to recall the deed altogether." Vaughan Williams L.J., on the other hand, expressed a clear opinion that such a deed would not be an escrow at all but only an undelivered deed.[4] His opinion on this point is not, of course, binding on me; but, so far as I know, it has never been dissented from and I propose to follow it.

Counsel for the defendants referred, on this part of the case, to the decision of the Court of Appeal in *Eccles* v. *Bryant*,[5] as an example of a case where a document signed and entrusted to an agent with instructions to deal with it in a certain way was to become binding when the instructions were carried out unless previously revoked. It is, however, to be observed that the document in question there was not a deed but a document under hand. Just as a deed which is not delivered at all when it is sealed, can be delivered at a later date by the grantor or by his agent appointed by deed, and in the meantime has no effect whatever, so, no doubt a document under hand can be executed with the intention that it shall have no effect whatever until something or other is done by the man who executes it, or by an agent of his who need not, of course, be appointed by deed. But, so far as I know, a unilateral document under hand cannot be executed as an escrow, i.e., as a document binding on the man who signs it and on his estate upon the fulfilment of a condition not expressed in the document. It does not seem to me, therefore, that such a case as *Eccles* v. *Bryant*[6] is in any way inconsistent with the view expressed with regard to deeds by Vaughan Williams L.J. in the *Foundling Hospital* case.[7]

If I had been of opinion that the revocable instructions given to the bank manager could have been regarded as conditions subject to which the deed might have been delivered as an escrow, the further question would have arisen whether the fact that on February 25, the debenture holders had no power to make an unconditional appointment of a receiver, since no demand for payment had yet been made, would itself have precluded them from delivering the appointment on that day as an escrow to take effect after a demand had been made. It is clear that a grantor cannot deliver a deed as an escrow if he has at that date no capacity to execute a deed at all; e.g., a deed executed by an infant as an escrow will not bind him even if he comes of age before the condition is fulfilled. Again, the view is expressed in Williams on Vendor and Purchaser, 3rd ed. (1922), pp. 1184 and 1185, that if a man delivers a conveyance of land as an escrow at a date when he has not got the legal estate conveyed but subsequently obtains it before the condition is fulfilled, the deed will not carry the legal estate to the grantee on fulfilment of the condition. So it might be argued here, that as the debenture holders had no power to appoint a receiver on February 25, an appointment made by a deed delivered as an escrow on that date could not be effective on the subsequent fulfilment of the conditions of delivery even though the power to appoint had by then arisen. It may be, however, that the answer to this question really turns on whether or not the debenture holders could on February 25 have delivered a deed appointing a receiver which was expressed to be conditional on a demand being made and not complied with. If they could have done that, then it would be somewhat unreasonable to say that they could not have delivered a deed as an escrow subject to the unexpressed condition that it was not to take effect until after the power had arisen. Apart from authority, I should have been inclined to hold that on the true construction of condition 12 (1) a mortgagee could not appoint a receiver before default conditionally on default being made, but the courts have held that where a mortgagee's power of sale only arises on the expiry of a notice to redeem given to the mortgagor, a contract of sale made conditional on the failure of the mortgagor to comply with the notice becomes binding on the expiry of the notice, subject to the price then being adequate: see *Farrar* v. *Farrars Ltd.*[8] By a parity of reasoning, it might be said that the debenture holders could have appointed the receiver on February 25, conditionally on default being made, and I suppose on his still being a suitable appointee at the date when default was made. I prefer, therefore, to rest my decision on this part of the case on the ground that a deed cannot be delivered as an escrow at all, subject to an overriding power in the grantor to recall the deed altogether, rather than on the fact that on February 25 the debenture holders had no power to make an unconditional appointment.

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[4] [1911] 2 K.B. 367, 374–375.

[5] [1948] Ch. 93; [1947] 2 All E.R. 865.

[6] [1948] Ch. 93.

[7] [1911] 2 K.B. 367, 374–375.

I must now turn to the alternative submission of the defendants. It is, as I understand it, based on the following propositions: (1) Condition 12 does not require an appointment of a receiver by the debenture holders to be under seal at all. (2) By section 74 (2) of the Law of Property Act, 1925, the directors of the debenture holders could have appointed an agent or agents to execute on their behalf a document under hand appointing the receiver as receiver. (3) Such an appointment under hand by an agent for the debenture holders could have been made with the intention that it should not bind the debenture holders unless and until the bank manager had carried out the various instructions given to him, and if made with that intention, it would have become automatically binding on the debenture holders when the instructions were carried out by the bank manager. (4) If this appointment cannot take effect as an escrow, I ought to treat it as being equivalent to an appointment under hand made by the directors, who signed it as agents for the debenture holders.

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[8] (1888) 40 Ch.D. 395, 412.

Propositions (1) and (2) are obviously correct and, for my part, I am prepared to accept proposition (3), but I am quite unable to see how the facts, which I must assume to be correct, justify proposition (4). The debenture holders were asked by the bank to prepare and seal a deed. I have not seen any resolution of the board of the debenture holders, but I assume that it accorded with this request. I have, therefore, no reason to think that the two directors who put their names on the appointment were authorised to do anything else than to witness the affixing of the seal. I cannot assume that they had any authority to bind the company by a document under hand or were purporting to do so. On this part of the case, counsel for the defendants referred me to *In re Tahiti Cotton Co.*,[9] where Jessel M.R. held that where the articles of association of a company permitted a transfer of shares to be made by an instrument in writing, a document signed and sealed by the transferor which was not a valid deed could be treated as an effective instrument in writing. I cannot see that this case really assists the defendants. There, the signature of the transferor (which, incidentally, at that date was not required for a deed) made the document on its face an instrument in writing within the meaning of the articles, whether or not it was also a valid deed. Here, the document in question is on its face a deed and nothing else, and I do not see how I can treat it as though it were an instrument under hand.

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[9] (1873) L.R. 17 Eq. 273.

In the result, therefore, I shall answer the question put to me by saying that on the assumptions of fact which the order directs me to make (but which, of course, may not correspond with the true facts), the receiver was not validly appointed receiver on February 28, 1958.

Order accordingly.
Defendants to pay the costs of the argument.

Solicitors: *Matthew Trackman, Lifton & Cunnington; Wilde, Sapte & Co.*

M. G. T.

BEESLY *v.* HALLWOOD ESTATES LTD.

[1959 B. No. 402.]

C. A.

1960
Nov. 16, 17.

Lord Evershed M.R., Harman and Donovan L.JJ.

Deed—Escrow—Lease—Lease executed by landlord company—Delivery of counterpart—Whether landlord bound to exchange lease for counterpart.

By a lease dated May 21, 1938, granting a term of 21 years from March 25, 1938, it was provided that, on the tenants giving at least six months' notice in writing previous to the determination of the lease, they should have the right to obtain a further lease for 21 years on the same conditions subject to certain amendments. The option was never registered as a land charge under the Land Charges Act, 1925. On January 10, 1948, the residue of the term was assigned to the plaintiff for valuable consideration; and, in August, 1955, the freehold reversion was purchased by the defendant company for money.

On July 1, 1958, the plaintiff gave notice exercising the option. Both the plaintiff and the directors of the defendant company were then of opinion that the option was binding on the defendant company. On August 27, 1958, the defendant company's solicitors wrote to the plaintiff's solicitors setting out the terms of the new lease and informing them that the grant of the new lease would be subject to an undertaking being given to redecorate the property. There was some further correspondence with regard to the terms of the undertaking but it was never given. On September 11, 1958, the defendant company's solicitors sent a counterpart lease to the plaintiff's solicitors for execution by the plaintiff. At some date between September 13 and 26, 1958, the seal of the defendant company was attached to the new lease; on September 24 or 25, 1958, the plaintiff executed the counterpart lease. At a board meeting of the defendant company held on September 26, 1958, it was reported that a new lease had been executed, when one of the directors suggested that the position as to the registration of the option should be investigated. The company's solicitors then said that it did not matter whether the option was registered or not. The defendant company were subsequently advised that the option was void for lack of registration, and on October 8, 1958, a letter was written to the plaintiff's solicitors informing them that the defendant company had decided not to grant the new lease.

In an action in which the plaintiff claimed, inter alia, that the defendants were bound by the lease sealed by them, Buckley J. held that the sealing of the lease by the defendant company imported delivery and they were bound by that lease, subject to the plaintiff handing over the counterpart which she had executed. On appeal:—

Held, that where a deed is delivered as an escrow it is not recallable, and upon the performance of the condition on which it is delivered, it becomes binding; and that, on the facts, the only condition which attended the delivery of the lease by the defendant company was that the plaintiff should execute and deliver her counterpart; the defendant company would become bound on such delivery.

The observations of Lord Cranworth in *Xenos* v. *Wickham* (1866) L.R. 2 H.L. 296 applied.

Decision of Buckley J. [1960] 1 W.L.R. 549; [1960] 2 All E.R. 314 affirmed.

APPEAL from Buckley J.[1]

By a lease made on May 21, 1938, the lessors, Dr. R. Collum's Representatives Ltd., granted to the tenants, Walter Weeks and Winifred Gertrude Weeks, a lease of property known as No. 132, 132a and 132b, Ewell Road, Surbiton, Surrey, for a term of 21 years from March 25, 1938. Clause 5 of the lease provided that "On giving at least six months' notice in writing expiring previous "to the determination of this demise the tenants shall have the "right to obtain a further lease for twenty-one years on the same "conditions subject to the following amendments:—(a) That "there shall be no right of renewal of the said term at the end of "such further lease. (b) That the yearly rentals payable during "the said term shall be as follows:—(i) £200 for the first seven "years. (ii) £225 for the second seven years. (iii) £250 for "the last seven years. (c) The legal costs, stamp duties and "other expenses attendant on the granting of such further lease "shall be borne by the tenants." That option was never registered as a land charge under the Land Charges Act, 1925.

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[1] [1960] 1 W.L.R. 549; [1960] 2 All E.R. 314.

By an assignment dated January 10, 1948, made between the tenants and the plaintiff, Phyllis Eirene Beesly, the tenants, in consideration of a payment of £5,000, assigned the demised property to the plaintiff for the residue of the term subject to the rent, covenants and conditions reserved by and contained in the lease. The assignment also comprised the tenants' stock-in-trade and other chattels and the goodwill of the business carried on by them at the property. In August, 1955, the defendants, Hallwood Estates Ltd., purchased the freehold reversion expectant on the term for money. The defendants had notice of the option when they bought the property, and on August 13, 1955, their solicitors applied for an official search under the Land Charges Act, 1925, for entries affecting No. 132, Ewell Road, and obtained a certificate of no subsisting entries.

On July 1, 1958, the plaintiff's then solicitors wrote a letter to the original lessors, c/o Messrs. Whiddington, estate agents, on the plaintiff's behalf, enclosing a formal notice to exercise the option given to her by clause 5 of the lease. On August 27, 1958, the defendants' solicitors wrote to the plaintiff's solicitors that they had been instructed to act by the defendants. The letter continued: "We are instructed that the term is to be for 21 years "at a rental of £200 per annum for the first seven years, £225 "per annum for the next seven years, and £250 per annum for "the remainder of the term. In other respects the new lease "will be in similar terms to the existing one and, this being so, "we shall be glad to know whether in the circumstances you "require to see a draft. Our clients inform us that the repairing "covenants have not been complied with by your client and that "the granting of the new lease will be subject to an undertaking "being given that the whole of the exterior and interior will be "redecorated within the course of the next six months, although "they understand that the work to the interior is already in "hand."

After some further letters, which are not material, the plaintiff's solicitors wrote to the defendants' solicitors on September 10, 1958, that "the rents are to be as set out in your letter and the "terms of the new lease are to be similar to those in the existing "lease. In these circumstances, we will gladly dispense with a "draft, but we should be glad to know by whom the new lease "is to be granted. Under the existing lease, the lessors are "Dr. R. Collum's Representatives Ltd." The letter also asked if the undertaking could be extended to nine months. On September 11, 1958, the defendants' solicitors wrote to the plaintiff's solicitors enclosing a counterpart lease for execution by the plaintiff and informing them that the lease would be granted by the defendants. On September 13, 1958, the defendants' solicitors wrote a further letter: "With reference to your letter to us of the "10th instant, our clients say that they are quite prepared for "the period of the exterior decorations to be extended from six "to nine months, and so far as the interior decorations are "concerned they understand that these will be completed shortly, "and they will be glad to hear from your client that this has been "done, so that they may make an inspection." At some date between September 13 and 26, 1958, the seal of the defendants was regularly attached to the new lease; and on September 24 or 25, 1958, the plaintiff executed the counterpart lease.

At a board meeting of the defendant company held on September 26, 1958, it was reported to the board as follows: "132, Ewell "Road, Surbiton. A new lease has been executed for the letting "of this property to Mrs. P. E. Weaver [the plaintiff] for a term "of 21 years from the 25th March, 1959, at a rent of £200 per "annum for the first seven years, £225 for the next seven years, "and £250 for the remaining seven years, the tenant to pay all "outgoings." At this time both the plaintiff and the directors of the defendant company believed that the option was valid; but one of the directors suggested that the position as to registration of the option should be investigated. The defendants were advised that the option was void for lack of registration, and on October 8, 1958, their solicitors wrote to the plaintiff's solicitor: "We are "instructed to inform you that our clients have decided not to "grant the new lease to your client." Further correspondence followed in which the plaintiff's solicitors called upon the defendants to execute the new lease.

On February 6, 1959, the plaintiff issued the writ claiming [as re-amended] (1) a declaration that the defendants were bound by the further lease sealed by them; (2) an order that upon her handing over to the defendants the counterpart of the further lease they should hand over the further lease to her; alternatively (3) a declaration that the plaintiff was entitled to a further lease of the demised premises upon the terms contained in clause 5 of the original lease; (4) an order that the defendants should execute a further lease in accordance with the terms contained in the counterpart lease or otherwise in accordance with the terms contained in clause 5; in either event (5) damages. By her re-amended statement of claim she alleged that she had duly exercised the option granted to her by clause 5; alternatively, that by their execution of the new lease and by all or some of the letters dated July 1, August 27, September 10, 11 and 13, 1958, the defendants had agreed to grant and she agreed to take a further lease; and that the defendants were bound by the new lease which they had sealed.

By their re-amended defence and counterclaim the defendants denied that the plaintiff had against them any right under clause 5 of the lease and relied on section 13 of the Land Charges Act, 1925. They also denied that they had executed the further lease and that they had agreed to grant or the plaintiff to take any further lease. Alternatively, they alleged that, if an agreement was constituted by the alleged execution or the letters, it was a condition precedent of the granting of the further lease that the undertaking as to repairs should be given; and, in the further alternative, that the alleged agreement was entered into under a mistake of fact or as to private right common to both parties, in that they both believed that the defendants were under a binding obligation to grant the new lease. They also denied that the further lease was binding on them, and alleged that it was delivered as an escrow and was not to take effect until the undertaking had been given and/or until the document should have been exchanged with the counterpart; alternatively, they alleged that the lease had been executed under the mistake previously alleged. The defendants counterclaimed for possession of the part of the property occupied by the plaintiff personally and for mesne profits.

It was agreed that, unless the option was unenforceable by reason of non-registration, it was exercisable by the plaintiff against the defendants, although there had been no express assignment to the plaintiff of the benefits of the option and that, if the option was valid, the notice exercising it had been effectually served on the defendants.

The facts as to the sealing of the new lease and as to what occurred at the board meeting held on September 26, 1958, were unknown to the plaintiff until one of the directors of the defendant company gave evidence at the hearing in March, 1960. On April 8, 1960, after the conclusion of the legal argument on the other points, the plaintiff was given leave to amend her statement of claim.

Buckley J. held that the option was void for non-registration as against the defendant company and that the letters passing between the parties did not constitute a contract to grant a new lease. However, he gave judgment for the plaintiff on the ground that the sealing of the lease imported delivery and that the company intended to deliver it as an escrow conditionally upon the plaintiff executing the counterpart and, accordingly, that subject to the plaintiff handing over the counterpart the defendants were bound by the lease.

The defendant company appealed on the ground (inter alia) that the lease not having been exchanged with any counterpart the defendant company was free to countermand the delivery of the alleged lease to the plaintiff and to refuse to be bound by it. The defendant company did not on appeal dispute that the sealing of the lease imported delivery.

The plaintiff gave notice of cross-appeal against the decision that the option was registerable under the Land Charges Act, 1925, and that the letters passing between the parties did not constitute a contract. The cross-appeal was not argued.

Nigel Warren Q.C. and *A. E. Holdsworth* for the defendant company. A number of points were canvassed before Buckley J. This appeal only relates to the fifth point he decided, which was that upon the plaintiff executing the counterpart of the lease, the lease already sealed by the defendant company would become binding upon them. The judge did not deal with the question whether where the intention is that a lease and counterpart shall be exchanged one party can hold the other party bound before the exchange. The authorities support the proposition that where an exchange is contemplated, the parties are not bound until exchange takes place. That was the view expressed by Romilly M.R. at the end of his judgment in *Phillips* v. *Edwards*.[2] In *Eccles* v. *Bryant and Pollock*[3] the Court of Appeal held that until exchange of contracts, where exchange was contemplated, there was no binding contract. That principle applies to the exchange of a lease and counterpart. The observations of Harman J. (as he then was) in *Hollington Bros. Ltd.* v. *Rhodes*[4] were to the like effect.

The results would be curious if the parties were bound although no exchange had been made. Neither could know if the other had executed his deed or counterpart. The ordinary practice is for there to be an exchange of the lease and counterpart. No date is inserted in either a lease or counterpart until exchange.

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[2] (1864) 33 Beav. 440, 445.

[3] [1948] Ch. 93; [1947] 2 All E.R. 865, C.A.

[4] [1951] 2 T.L.R. 691; [1951] 2 All E.R. 578.

The date then inserted is the date of exchange. On the facts, the parties here were never ad idem.

Sir Lynn Ungoed-Thomas Q.C. and *F. Bower Alcock* for the plaintiff. That the lease was delivered by the defendant company conditionally on its exchange for the counterpart is a matter of inference. There is no positive evidence on the point. The defendant company admit that Buckley J. rightly held that the sealing of the deed imported delivery. The lease executed by the company was accordingly a valid deed. The question is what is the effect of the delivery of a deed as an escrow. Where a deed has been delivered as an escrow, it has been finally delivered and the grantor cannot resile, if the condition on which it was delivered is fulfilled. An escrow cannot be withdrawn. However, it is always open to the other party to refuse to take the benefit of the deed. Should a man deliver a deed in escrow and die before the condition is fulfilled, if subsequently it is fulfilled, his representatives will be bound. The effect of delivering a deed in escrow is considered in Norton on Deeds, 2nd ed., pp. 15, 18, 20, the statement of the law there follows that in Sheppard's Touchstone, 7th ed. (1820), pp. 58, 59, except that there is omitted from Norton the latter part of the relevant passage in Sheppard's Touchstone, where it is stated that when the condition is performed the deed takes effect and no act of God or man can hinder or prevent it.

If a man delivers a deed in escrow on condition that it is exchanged for the counterpart, he cannot go back on that condition. Similarly, the lessee is bound immediately he executes the counterpart. The parties are bound by their respective executions of the lease and counterpart. There is no need for an exchange. A condition cannot be inferred that not only was there to be an exchange of the lease for the counterpart but also that the lease should not have been revoked. A power to revoke is inconsistent with the delivery of a deed: *Foundling Hospital (Governors and Guardians)* v. *Crane* [5]; *Windsor Refrigerator Co. Ltd.* v. *Branch Nominees Ltd.*[6]

The decisions in *Phillips* v. *Edwards*,[7] *Eccles* v. *Bryant and Pollock* [8] and *Hollington Bros. Ltd.* v. *Rhodes* [9] have no relevance to this case, since they were all concerned with written contracts and not with deeds. Here the plaintiff is not relying on any contract but on the fact that the company had executed and delivered the lease as a deed. It appears from the observations of Blackburn J. in *Xenos* v. *Wickham* [10] that a deed is binding on its execution on the obligor before it comes into the custody of the obligee.

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[5] [1911] 2 K.B. 367.

[6] [1960] 3 W.L.R. 108; [1960] 2 All E.R. 568.

[7] 33 Beav. 440.

[8] [1948] Ch. 93.

[9] [1951] 2 T.L.R. 691.

On the facts, it is submitted that there is no evidence that the lease was delivered by the defendant company as an escrow or upon any condition at all. After its execution, it was too late to recall the lease. The lease was binding on the company after its delivery. The plaintiff, however, could have refused to accept the lease. [Reference was made to section 74 of the Law of Property Act, 1925.]

The onus is on the defendant company to prove that a condition was attached to the execution of the lease. That onus must be discharged by positive evidence. No inference can be drawn contrary to the written and oral evidence. If any inference of the existence of a condition is to be drawn here, the inference is that the only condition was that a counterpart should be executed, not that there should be an exchange of the lease and counterpart. For the defendant company to succeed in this appeal, they must show that the lease was executed subject to a condition that there should be an exchange and that before exchange the lease was subject to recall. There is no evidence which would justify such a conclusion.

Nigel Warren Q.C. in reply. The decision of Cross J. in *Windsor Refrigerator Co. Ltd.* v. *Branch Nominees Ltd.*[11] was not a case involving two deeds. Both *Phillips* v. *Edwards* [12] and *Hollington Bros. Ltd.* v. *Rhodes* [13] were cases of leases, and an exchange was held to be necessary before a binding contract arose. The propositions in Sheppard's Touchstone are not concerned with the case where two deeds fall to be executed. There no exchange was required or contemplated. Sheppard's Touchstone does not deal with deeds in two parts. If no exchange is required, then neither party can know what is the legal position.

LORD EVERSHED M.R. I will ask Harman L.J. to deliver the first judgment.

HARMAN L.J. This is an appeal from a reserved decision of Buckley J. delivered last April. It concerns the lease of property consisting of a shop and two flats in Ewell Road, Surbiton.

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[10] (1867) L.R. 2 H.L. 296, 312.

[11] [1960] 3 W.L.R. 108.

[12] 33 Beav. 440.

[13] [1951] 2 T.L.R. 691.

The story begins in 1938 when this property was the subject of a lease by the predecessors in title of the defendants to predecessors in title of the plaintiff. That lease was for a term of 21 years from Lady Day, 1938, and it contained an unconditional option for the lessee to exercise by notice the right, which was thereby given to him or her, to have a further lease of 21 years to start from Lady Day, 1959—that is to say, when the old lease ended.

In 1948, the lease was assigned to the plaintiff, who paid £5,000, partly for the assignment and partly for the goodwill of a hairdressers' business carried on in the shop. The reversion was assigned to the defendants in 1955. On July 1, 1958, the plaintiff sent a notice to the defendants or their solicitors exercising the option, and there is no dispute, and never has been, that in point of form that notice was a good exercise of the option.

There was a certain amount of negotiation between the solicitors by correspondence, which does not matter, for on September 11, 1958, an engrossed counterpart of the proposed new lease was sent to the plaintiff's solicitors. Between that date and September 26 the new lease was executed by the defendants, and of that more hereafter. About the same time, on September 24 or 25, the counterpart was executed by the plaintiff. On October 8, the defendants wrote refusing to go on with the matter. There had by then been no exchange of the two documents.

The writ was issued on February 6, 1959, and the statement of claim was delivered on February 26. By that claim the plaintiff—who is now the respondent to this appeal—asked for a declaration that she was entitled to a further lease—that is to say in pursuance of the option—and an order upon the defendants to execute. The defence was that the option was void as it had never been registered as an estate contract under the Land Registration Act, 1925. Confronted with that, the plaintiff amended her statement of claim and pleaded that, if the option was itself bad, the correspondence between the solicitors prior to September 26 amounted to a fresh contract to grant a new lease and that specific performance of that should be granted. In June the defence was amended and it was there pleaded that there was a condition precedent to any agreement that might exist, namely, that certain decorations should be done and that the parties had never reached any consensus on that subject and, therefore, no agreement was made. Alternatively, there was a plea of mistake, and the defendants counterclaimed for possession, the former lease having run out on Lady Day of that year.

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The tenant (the plaintiff) was still in occupation. There followed the usual discovery, and it is the lamentable fact that the directors of the defendant company did not disclose the document of lease executed by them, nor did they disclose the minute book of the company which, as hereinafter appears, contained a most relevant entry, and the action came to trial in March of this year without the plaintiff being aware of those two matters. The minute and the lease came to light during the course of the hearing, and it is not surprising that the judge then granted an adjournment to the plaintiff and that she re-amended her statement of claim on March 31 to plead that the lease had been executed and that upon tender by her of the counterpart—which she had always been ready to do—she was entitled to have the lease handed over to her: the contract on this footing was complete and not a matter for specific performance at all.

There was a re-amendment of the defence in which it was admitted that the seal of the defendants was affixed to the document of lease, but it was apparently denied that there had been any delivery. Alternatively, it was said that, if there had been delivery, it was subject to a condition, namely, that there should be an agreement about the so-called decorations and that there should be exchange, which had never occurred. The hearing was resumed on April 7 on that footing.

A number of points was taken and on two of them the defendants were successful. The judge held that the option was not binding for want of registration as an estate contract: further, that the letters passing between the solicitors and the document of lease and the counterpart themselves did not constitute any new contract of which the plaintiff could obtain specific performance. One of the pleas in the defence was rejected, namely, that about mistake: the judge held that the mistake, if there was one, was a mistake of law and, therefore, no defence. In the end the plaintiff succeeded on the ground, added by the re-amendment, that the deed had been executed as an escrow and, that being so, it was not a mere offer that could be withdrawn before acceptance but was a deed subject to a condition; and that there had been no breach of any condition to which it was subject and, therefore, it was a binding document. It is on that point alone that the defendants have appealed to this court.

There is a cross-notice whereby the questions of registration and contract are put in issue, but those questions have not been agitated before this court because they do not arise on the appeal and would only arise in the event of the appeal being successful.

The question, therefore, was, first of all: what was the nature of this document? The judge held that it was a deed delivered as an escrow—in other words, that there had been a good execution and delivery—and that matter was not put in issue before us at all.

The judge dealt with the matter quite shortly. He held that in view of section 74 of the Law of Property Act, 1925, he was bound, prima facie, to hold that there had been due execution, this being a document under seal issuing from a body corporate and appearing on the face of it to be complete. He said[1]: " Mr. " Holdsworth "—that is the defendants' counsel—" concedes that " the seal of the defendants was regularly attached to the lease. " I know nothing further about the actual circumstances of its " being attached. It will be recollected that the correspondence " to which I have made reference discussed an undertaking to " be given by the plaintiff relating to certain decorations . . . " I do, however, know that the seal is countersigned by the " chairman of the board " and then he recites a minute and says: " . . . it is clear from the evidence that everybody present " at the board meeting of September 26 regarded the lease sealed " by the defendant company as binding, albeit they did so with " regret. Whereas this attitude of mind would, in my opinion, " not be inconsistent with the binding quality of the lease being " conditional on the lessee binding herself by execution of a " counterpart to obligations on her part expressed in the lease, " it is inconsistent with any idea that it was also conditional on " some matter wholly extraneous to the lease, as was the proposed " undertaking as to redecoration. I, therefore, reach the conclusion of fact that the defendants, by sealing the lease, intended " to deliver, and did deliver, it as their deed intended to bind them " conditionally only upon the plaintiff executing a counterpart, " but subject to no other condition."

It was admitted before us, and not surprisingly, that this was right, for when one looks at the minute of September 26 one finds a record of a meeting on September 26 at which all the three directors of the appellant company were present: It reads: " 132, Ewell Road, Surbiton. A new lease has been executed for " the letting of this property to Mrs. P. E. Weaver " [the

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[1] [1960] 1 W.L.R. 549, 561, 562, 563; [1960] 2 All E.R. 314.

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plaintiff] "for a term of twenty-one years from March 25, 1959, "at a rent of £200 per annum for the first seven years, £225 "for the next seven years and £250 for the remaining seven "years, the tenant paying all outgoings." This, be it observed, is a report by the chairman, who was also the managing director of this company, to the board meeting and it was accepted as a fait accompli.

It was only at that meeting and after that report had been made, a general regret being expressed at the company being obliged to create this new lease—which was, of course, extremely unprofitable to them having regard to the rent—that one of the board suggested that there might be a loophole, namely, if the earlier document of lease containing the option were not registered. The company's solicitors were consulted and they expressed the view, apparently, that it did not matter whether it was registered or no, but one of the directors, who was a solicitor (and who gave evidence), made further investigations in the matter and, as a result, it was decided to write the letter, which I have mentioned, on October 8 declining to go on with the matter.

The substantial plea is this, that as by October 8 there had been no performance of the condition as to exchange in that the counterpart had not been returned, the defendant company was entitled to withdraw from what was, in effect, an offer made subject to a condition not then accepted and, therefore, retractable at will by the offeror.

If that were the true nature of a document delivered in escrow the result might follow. The question, then, is: what is an escrow? Can a body or an individual having executed a document under seal as an escrow subject to a condition resile before the condition is accepted? That, really, is the point now taken and it is a very narrow one.

Of course, if there had been no delivery, as was pleaded, the matter would be wholly different; but that, by the time the action came to this court, had been decided as a fact by the judge and accepted by the defendants.

An escrow, then, is a type of document which, perhaps, is best described in Norton upon Deeds, 1st ed., p. 15; I read from the author's edition: "If an instrument be delivered to take effect "on the happening of a specified event, or upon condition that "it is not to be operative until some condition is performed, then "pending the happening of the event or the performance of the "condition, the instrument is called an escrow. 'The maker [of "'a deed] may so deliver it as to suspend or qualify its binding "'effect. He may declare that it shall have no effect until a "'certain time has arrived, or till some condition has been "'performed, but when the time has arrived, or the condition "'has been performed, the delivery becomes absolute, and the "'maker of the deed is absolutely bound by it, whether he has "'parted with the possession or not. Until the specified time has "'arrived, or the condition has been performed, the instrument "'is not a deed: It is a mere escrow'"—that is a quotation from Lord Cranworth's speech in the leading case of *Xenos* v. *Wickham*.[2]

In Norton, p. 17, there is a further relevant statement: "Whether the document was delivered as an escrow or as a deed "is a question of what the parties intended, and that intention "may appear either from their statements or the circumstances" —that is to say, the question is one of fact, and it has been so decided in this case.

We also had our attention drawn to Sheppard's Touchstone, and I look at the second page 58 in the 1820 edition of that work and find this: "The delivery of a deed [*read* writing] as "an escrow, is said to be where one doth make and seal a deed "[*read* writing,] and deliver it unto a stranger until certain "conditions be performed, then to be delivered to him to whom "the deed [*viz.* writing or grant] is made, to take effect as his "deed. And so a man may deliver a deed, and such delivery is "good," and then two so called "cautions" are mentioned and those cautions relate to matters which are now no longer law. Then I turn to page 59 and find this: "But when the conditions "are performed, and the deed is delivered over, then the deed "shall take as much effect as if it were [had been] delivered "immediately to the party to whom it is made, and no act of "God or man can hinder or prevent its effect then, if the party "that doth make it be not, at the time of the making thereof, "disabled from making it."

Lastly on this subject I quote a dictum of Farwell L.J. in *Foundling Hospital* (*Governors and Guardians*) v. *Crane*.[3] I need not deal with the facts of that case; it was there held, as the head-note shows, that the proper inference from the facts was that the document was never legally delivered either absolutely as a deed or as an escrow and was therefore inoperative. From Farwell L.J.'s

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[2] (1866) L.R. 2 H.L. 296, 323.

[3] [1911] 2 K.B. 367, 379, C.A.

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decision I read these words: "Was the deed, then, delivered as "an escrow, or was there no delivery at all? I doubt if a man, "by executing a deed, and handing it over to his own solicitors to "be held on his behalf until he gives them further instructions, "makes a delivery of it as an escrow at all. I doubt also if a "deed can be delivered as an escrow at all subject to an over-"riding power in the grantor to recall the deed altogether."

In other words, if you do deliver a document as an escrow it is your act and deed and is not recallable by you. If, of course, the condition be never performed, it never becomes binding, and I suppose there must come a time, if there be unreasonable delay in the performance of the condition, when, in these days at any rate where equitable principles govern the actions of the court, the person or firm that has executed the escrow would be released from its obligation. But in this case there was no refusal on the part of the plaintiff to exchange the counterpart. It is quite clear that was the condition, although some attempt was made to argue that no condition was attached. In my opinion, however, where it is the common intention of the parties—as, indeed, is almost universal in these days—to proceed by means of lease and counterpart, it is readily to be inferred that delivery of the counterpart is a condition of the escrow.

But nobody here on the defendant company's part called on the plaintiff to deliver her counterpart. There was no unreasonable withholding of it or delay. It was merely that the company, having second thoughts or, perhaps, shrewder advice, determined to attempt to get out of what was for them in the event binding. In my judgment, that is exactly what they cannot do.

Reliance was placed on a case of *Phillips* v. *Edwards*.[4] Those who rely on reports in 33 Beavan are sometimes said to be in the last ditch, but I do not complain at all here that there is anything wrong about the decision. However, it was a decision in a case about contract and it was said that the execution of the two documents without exchange did not amount to a contract. There is, in my judgment, nothing controversial about that; indeed, I ventured to express some such view in *Hollington Bros. Ltd.* v. *Rhodes*,[5] a case to which the judge referred in his judgment. The statement of Romilly M.R. in *Phillips* v. *Edwards*[6] and my own statement were relied upon by Mr. Warren as showing that it was necessary that there should be an exchange before the parties were bound. If the matter had lain in contract that would be right, if there had been no delivery of the deed of lease that would be right; but, on the facts here, it is quite clear that there was a delivery, but a delivery in escrow. But an escrow is no less a man's act and deed because there is a condition outstanding than is a perfectly completed deed handed over, and, therefore, the company was at least bound to wait a reasonable time before attempting to resile from their position.

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[4] (1864) 33 Beav. 440.

[5] [1951] 2 T.L.R. 691, 694; [1951] All E.R. 578.

[6] 33 Beav. 440.

In my judgment the judge, although he did not deal specifically with that aspect of the case, did, in fact, decide it on that ground, and quite rightly, and so far as the appeal goes it seems to me that it fails and ought to be dismissed.

DONOVAN L.J. It is, of course, the case that a deed may be delivered subject to a condition that it shall not take effect until some other event happens or some condition is fulfilled; in other words, it may be delivered as an escrow. But if I purport to deliver a deed, and at the same time indicate that I am to be free to undo it at any time before it passes to the grantee, I am not delivering a deed subject to a condition, I am not delivering a deed at all; because delivery in this context indicates an intention to be bound presently by the deed, albeit in some cases subject to a condition. I doubt whether Lord Romilly M.R. intended to say anything different in the case of *Phillips* v. *Edwards*[6] to which Harman L.J. has referred.

In the present case the only condition which, in my view, could be spelt out of the facts attending the delivery of the lease by the defendant company is, as the judge held, that the plaintiff should execute and deliver her counterpart, which she did. If there were the further condition that, having done this, she should send that counterpart to the defendants, she has at all times been ready and willing to do so.

I agree, accordingly, that the appeal should be dismissed.

LORD EVERSHED M.R. I am also of the same opinion and only add a very few words to what has been said by my brethren out of respect to the arguments of counsel before us in a case which is somewhat unusual in its nature, raising, as it does, a short but strict point of law.

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[6] 33 Beav. 440.

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It was conceded by Mr. Warren that the sealing of the lease in question shortly before September 26, 1958, by the defendant company operated as execution and delivery, but it was said that the lease was delivered as an escrow; that is to say, that its effect was suspended or qualified pending the performance of the indicated condition.

The condition suggested was that there must be first an exchange, in accordance with ordinary conveyancing practice, of the lease on the one hand and in counterpart on the other. As Sir Lynn Ungoed-Thomas pointed out, there is substantial ground at any rate upon the evidence, for the view that the sealing of this deed was not at the time intended to be, still less expressed to be, conditional. Buckley J., however, held upon the facts that the lease was delivered as an escrow, subject to the condition that the counterpart should be executed and delivered by the plaintiff lessee. I am certainly prepared to accept that conclusion, and since, as is always so in the case of a lease, there are substantial obligations put upon the lessee, such a condition would be the natural, and I venture to think the only natural, condition to the delivery of the lease as an escrow.

As Harman L.J. has pointed out, there is an important distinction in this respect between an instrument in writing, which may be executed conditionally, and a deed. For in the case of the former, until the condition is performed, there is nothing at all. The position is not the same in the case of an instrument under seal executed and delivered, for in the latter case, as pointed out in the passage which Harman L.J. has cited in *Xenos* v. *Wickham*,[7] when the time has arrived or the condition has been performed the delivery becomes absolute and the maker of the deed is absolutely bound by it whether he has parted with its possession or not.

The real basis of Mr. Warren's argument is that pending the performance of the conditions—that is to say, execution and delivery of the counterpart by the plaintiff—the defendant company were entitled, for any reason they thought good, to resile altogether from the effects of their deed; and that, in my judgment, is inconsistent with the fundamental character of delivery of the lease as an escrow. No doubt if performance of the condition is long enough delayed the party who has delivered the deed might be relieved in equity from any further consequences; but like my brethren, I am of opinion that where a lease, such as the

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[7] L.R. 2 H.L. 296.

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lease in this case, has been executed and delivered as an escrow he who has executed and delivered it cannot thereafter, pending performance, resile from it altogether and do so on an entirely novel ground. I mean by that last expression that when the execution and delivery was reported to the board of the defendant company there had been a suggestion that the option was unenforceable. At the time, the advice given to the board was that such suggestion was unfounded and so the matter was left. At a later date other advice was given which led the defendant company to suppose that—as, indeed, Buckley J. held—the option was unenforceable by reason of want of registration, and what the defendant company here has sought to sustain is that having discovered afterwards that fact, they can on that ground altogether resile from the deed at any time before the actual performance of the condition.

For the reasons which have already been given by Harman L.J.—with which I entirely agree—I cannot accept that submission, and I, like my brethren, therefore think that the appeal fails and must be dismissed.

Appeal dismissed with costs.

Solicitors: *George C. Carter & Co.; Sydney S. Silverman.*

B. A. B.

QUALTER, HALL & CO. LTD. *v.* BOARD OF TRADE AND ANOTHER.

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Nov. 23;
Dec. 7.
Cross J.

[1960 Q. No. 1275.]

Company—Exempt private company—"Providing capital"—Reorganisation—Purchase of shares from members by finance and banking companies—Whether provision of capital for company—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 127, 129 (4); *Sch.* 7, *paras.* 1, 2 (1) (2), 7 (1), 9.

Statute—Construction—Ambiguity—Title of section—Companies Act, 1948, *Sch.* 7, *para.* 7.

An exempt private company, in order to reduce the disparity between its nominal and its issued capital, and to provide the principal shareholders with funds to pay the estate duty prospectively payable on their deaths without jeopardising the future of the company as a family business, on July 22, 1955, passed a series of resolutions increasing the capital from £115,000 to £165,000 by the creation of 25,000 6½ per cent. £1 cumulative preference shares and 25,000 " A " ordinary £1 shares, converting the existing 85,000 non-cumulative redeemable preference shares, of which 60,000 had been issued, into 85,000 6½ per cent. cumulative preference shares and amalgamating them with the 25,000 6½ per cent. cumulative preference shares, converting 3,000 £10 ordinary shares into 30,000 " B " £1 ordinary shares and capitalising a sum of £75,000 in the general reserve account. The directors were authorised to appropriate that sum to the members who should be registered immediately after the passing of the resolution as holders of the 30,000 " B " ordinary £1 shares in proportion to the amount paid up on those shares and to apply the sum in paying up in full at par the 50,000 unissued 6½ per cent. £1 cumulative preference shares and the 25,000 unissued " A " ordinary £1 shares and to allot those shares to those members. At the same time the company adopted a new set of articles, article 72 of which provided that the " A " ordinary shareholders and the preference shareholders were entitled to receive notice of general meetings but were not entitled to attend and vote at them unless, in the case of the preference shareholders, at the date of the notice the dividend on their shares was six months in arrear, and in the case of both classes of shares, the business of the meeting included certain specified resolutions. At a directors' meeting held on the same day the directors resolved that the £75,000 should be capitalised, applied and allotted as resolved, and the chairman stated that as a result of arrangements made with a finance company, that company had agreed with the holders of those shares to purchase one-third of each of the 50,000 preference shares and 25,000 of the " A " ordinary shares, and to place the other two-thirds of each class with four other companies which were banking or finance companies within the meaning of paragraph 9 of Schedule 7 to the Companies Act, 1948, so that the status of an exempt private company would be preserved, while the members renounced their interest in the shares. Letters of authority and request for this allotment were then signed by the members and received by the company, and it was resolved that the 50,000 unissued 6½ per cent. £1 cumulative preference shares and the 25,000 unissued " A " £1 ordinary shares be allotted to the banking and finance companies.

On a summons by the company to determine whether, on the true construction of section 129 and Schedule 7 to the Companies Act, 1948,[1] the company had, in the events which had happened, ceased to be an exempt private company within the meaning of section 129 (4):—

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[1] Companies Act, 1948, s. 129: " (1) A private company shall be " excepted from the requirements " imposed by section 127 of this Act " if, but only if,—(a) the conditions " mentioned in the next following " subsection are satisfied at the date " of the return and have been satisfied " at all times since the commencement of this Act . . . (2) The " said conditions are—(a) that the " conditions contained in the Seventh " Schedule to this Act are satisfied " as to the persons interested in the

Held, (1) that the definition in paragraph 9 of Schedule 7 to the Act of 1948 of a banking or finance company must be read into paragraph 7, and that, on their true construction, the words "providing capital" in the heading to paragraph 7 meant providing capital for the company, and were inapt to describe payment of the purchase price of shares by a purchaser to his vendor, but related solely to the provision of capital for the company, and that, therefore, the company did not fall within the exception in paragraph 7, and ceased to be an exempt private company as from July 22, 1955.

(2) *Held*, further, that the banking and finance companies had not the right to exercise one-fifth or more of the total voting power at any general meeting of the company within the meaning of the

"company's shares and debentures ". . . (4) Any reference in this Act "to an exempt private company shall "be construed as referring to a company with respect to which the "conditions mentioned in subsection "(2) of this section are satisfied and "have been satisfied at all times "since the commencement of this Act "or since the giving by the Board of "Trade of a direction under the proviso to subsection (1) of this "section."

Sch. 7: "1. The basic conditions "as to the shares or debentures of "the company whose exemption is in "question are—(*a*) that no body "corporate is the holder of any of "the shares or debentures; and (*b*) "that no person other than the "holder has any interest in any of "the shares or debentures; but these "conditions are subject to the exceptions provided for by the following paragraphs of this Schedule. "2.—(1) The rules contained in the "following sub-paragraphs of this "paragraph shall apply for the purposes both of the basic conditions "and of the exceptions from those "conditions. (2) Where any share "or debenture or any interest in any "share or debenture is subject to a "charge in favour of a banking or "finance company by way of security "for the purposes of a transaction "entered into in the ordinary course "of its business as such—(*a*) any "interest under the charge, whether "of the banking or finance company "or a nominee for it, shall be disregarded; and (*b*) if the banking "or finance company or its nominee "is the holder of the share or debenture, the person entitled to the "equity of redemption shall be "treated as the holder, whether he "has a present right to redeem or "not . . . . *Exception for Banking or Finance Company providing* "*Capital*. 7. (1) The first of the basic "conditions shall be subject to an "exception for any shares or debentures held by or by a nominee for a "banking or finance company, where "the banking or finance company "acquired the shares or debentures or "its interest therein in the ordinary "course of its business as such and "by arrangement with the relevant "company or its promoters: Provided "that this exception shall not apply "if the banking or finance company "has the right (or, where there is "more than one such company holding shares or debentures to which "this exception has to be applied in "determining the relevant company's "right to be treated as an exempt "private company, they have between "them the right) to exercise or control the exercise of one fifth or more "of the total voting power at any "general meeting of the relevant company. . . . 9. In this Schedule the "expression 'banking or finance com-"'pany' means any body corporate "or partnership whose ordinary business includes the business of banking and any other body corporate "whose ordinary business includes "the business of lending money or "of subscribing for shares or debentures. . ."

proviso to paragraph 1 (1), so that, if the case had fallen within the exception in paragraph 7, it would not have been taken out of it by the proviso.

ADJOURNED SUMMONS.

The following statement of facts is taken from the judgment of Cross J.

Before the reorganisation of its capital, which took place in July, 1955, the capital of the plaintiff company, Qualter, Hall & Co. Ltd., a private company, consisted of £115,000 divided into 85,000 6 per cent. non-cumulative redeemable preference shares of £1 each, of which 60,000 had been issued and were fully paid, and 3,000 ordinary shares of £10 each, all of which had been issued and were fully paid. All the issued shares were held by thirteen members of the Hall family. In this circumstance, it was accepted by the Registrar of Companies that the conditions contained in the Seventh Schedule to the Companies Act, 1948, were satisfied, and that the company was an exempt private company.

As the balance-sheet of the company as at October 31, 1954, showed substantial reserves and unappropriated profits, the directors considered whether the capital structure should not be reorganised so as to reduce the disparity between the nominal amount of the paid-up share capital and the real value of the capital employed in the business, and at the same time to provide the principal shareholders with funds with which the estate duty prospectively payable on their deaths in respect of their holdings could be met without jeopardising the future of the company as a family business. After discussion with the directors, the auditors of the company prepared a memorandum outlining a possible scheme for the capitalisation of the reserves, under which further preference and ordinary shares would be issued by the company credited as fully paid-up and sold to financial institutions by the shareholders entitled thereto. A copy of that memorandum was sent to Estate Duty Investment Trust Ltd., which investigated the company's affairs in detail in order to ascertain whether the scheme was one in which they would be prepared to take part and recommend other financial institutions to join. The directors of the company provided Estate Duty Investment Trust Ltd. with all the information which it required for that purpose since they were of the opinion that the proposed reorganisation would not only be to their personal advantage as shareholders but would also ensure the continuity of the company's business under family control. In the result, Estate Duty

Investment Trust Ltd. and four other financial institutions decided to become shareholders in the company and its capital structure was reorganised pursuant to a series of resolutions passed by the company on July 22, 1955.

The effect of these resolutions was, stated briefly, as follows: (1) The capital of the company was increased from £115,000 to £165,000 by the creation of 25,000 6½ per cent. cumulative preference shares of £1 each and 25,000 "A" ordinary shares of £1 each. (2) The existing 85,000 non-cumulative redeemable preference shares were converted into 85,000 6½ per cent cumulative preference shares and amalgamated with the 25,000 newly created 6½ per cent. cumulative preference shares. (3) The existing 3,000 £10 ordinary shares were converted into 30,000 "B" ordinary shares of £1 each. (4) A sum of £75,000, forming part of the undivided profits of the company standing to the credit of the general reserve account, was capitalised and the directors were authorised to appropriate such sum to the members who should be registered immediately after the passing of the resolution as holders of the 30,000 "B" ordinary shares of £1 each resulting from the subdivision and conversion into such shares of the former 3,000 shares of £10 each in the capital of the company in proportion to the amount paid up on the said "B" ordinary shares held by them respectively, and to apply the said capitalised sum in paying up in full at par the 50,000 unissued 6½ per cent. cumulative preference shares of £1 each and the 25,000 unissued "A" ordinary shares of £1 each in the capital of the company, such shares to be allotted and distributed, credited as fully paid up, amongst the said members in the proportion aforesaid. At the same time the company adopted a new set of articles, by article 72 of which the "A" ordinary shareholders and the preference shareholders were entitled to receive notice of general meetings of the company but were not entitled to attend and vote at such meeting unless either (a) as regards the preference shareholders at the date of the notice convening the meeting the dividend on their shares was six months in arrear, or (b) as regards both the "A" ordinary shareholders and the preference shareholders the business of the meeting included the consideration of a resolution for reducing the capital of the company or winding up the company or sanctioning a sale of its undertaking or varying or abrogating any of the special rights attached to the "A" ordinary shares or to the preference shares or altering the voting rights attached to any class of shares or altering the provisions of the memorandum of association of the company with respect to the objects of the company.

At a directors' meeting held on July 22, 1955, after the passing of these resolutions by the company, the directors resolved that the £75,000 should be capitalised and applied in the payment up in full of the preference and " A " ordinary shares referred to in the resolution, and allotted and distributed amongst the " B " ordinary shareholders in the manner contemplated by the resolution. The chairman explained that as a result of arrangements made with Estate Duty Investment Trust Ltd., the latter had agreed with the members entitled to the shares in question to purchase from them one-third of each of the 50,000 preference shares and 25,000 " A " ordinary shares, and to place the other two-thirds with four other companies who were also banking or finance companies as defined in paragraph 9 of the Seventh Schedule to the Companies Act, 1948. The exempt private company status of the company, the chairman continued, would thus be preserved, but the members concerned would have to renounce their respective interests in the shares in favour of Estate Duty Investment Trust Ltd., and the companies with whom they had placed the remainder of the shares. Letters of authority and request in respect of the allotment of the preference shares and " A " ordinary shares to which the members in question were respectively entitled duly signed by them were then received by the meeting, and it was resolved that pursuant to the foregoing resolutions and to such letters the 50,000 unissued 6½ per cent. cumulative preference shares of £1 each and the 25,000 unissued " A " ordinary shares of £1 each be allotted to the five banking or finance companies concerned in the proportions set out in the Schedule to the directors' resolution.

In the result, therefore, on payment to each of the shareholders concerned of the appropriate purchase price, five companies, who were admittedly banking or finance companies within the meaning of the Seventh Schedule, became together entitled to 50,000 preference shares and 25,000 " A " ordinary shares in the company.

A summons was issued on the application of the company, to which the Board of Trade and the Registrar of Companies were defendants, to determine whether, upon the true construction of section 129 and the Seventh Schedule to the Companies Act, 1948, in the events which had happened the company had ceased to be an exempt private company within the meaning of section 129 (4).

Sir Milner Holland Q.C. and *R. B. S. Instone* for the plaintiff company. The Board of Trade have said that the company ceased to be an exempt private company from July 22, 1955, because (a) paragraph 7 of the Seventh Schedule to the Companies Act, 1948, only applies to cases where the banking or finance companies provide capital for the company and not to cases such as this, where the shares are bought from shareholders who are entitled to have them allotted to them; or, alternatively, (b) the proviso to paragraph 7 applies since the banking or finance companies have the right to exercise more than one-fifth of the total voting power at general meetings called to consider the resolutions referred to in article 72.

As to (a): the words in paragraph 7 " acquired the shares or " debentures or its interest therein . . . by arrangement with " the . . . company " include a purchase of the shares from the holders by arrangement with the company, as well as an issue of shares by the company in consideration of money paid to it; if Parliament had intended to confine the exception to the latter case it would have spoken of subscribing for shares. This is a technical provision and the absence of words stating that capital is to be capital of the company is significant. The reference to an acquisition of an " interest " in the shares should not be narrowly construed to mean only an interest acquired by a banking or finance company in the course of lending money or subscribing for shares. The scheme here was clearly " by " arrangement " with the company since it was evolved for the benefit of, and was important to, the company, and it was, and only could, be carried out with the concurrence of the company. If " providing capital " in the heading to paragraph 7 means providing capital for the company, the company obtained additional capital through the capitalisation of its reserves.

As to (b): the banking and finance companies have only the right to exercise more than one-fifth of the total voting power in respect of the preference shares when the dividend is six months in arrear, and in respect of the preference and " A " ordinary shares only on certain resolutions, and therefore they have not a right to vote at " any " general meeting, for " any " general meeting means all general meetings and not " any possible " general meeting "; if it meant the latter the exception would be reduced in value; paragraph 7 is concerned with overall control. The words " at any general meeting " and not " on any " resolution " are used, and thus power to vote at all meetings

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must be intended. "Any" has a similar meaning in sections 132 (1) and 133 (1) (*b*), and in article 58 of Table A.

[CROSS J. What is the meaning of a right to vote at a meeting, when a vote can only be exercised on certain resolutions only?]

A right to vote on one resolution means a right to vote at a meeting. Although each share carries a right to vote it is incorrect to say that the ownership of one-fifth of the shares confers a right to exercise one-fifth of the total voting power since the court does not regard voting rights as attached to shares.

Instone following. The construction of the proviso is essentially a matter of language. The relevant phrase is "total voting "power"; this is a generalised concept, not linked with the votes exercisable on any particular occasion. For the proviso to operate at all there must be a right to vote, either in or dehors the articles, at any meeting, namely, at every possible meeting, but there is here no such right. The proviso cannot work where articles confer voting rights not in terms of meetings but in terms only of certain resolutions, and thus it would not affect the argument if the preference dividend were six months in arrear.

E. Blanshard Stamp for the Board of Trade and the Registrar of Companies. Parliament has said that all companies must furnish returns, but that some companies are entitled to exception. It is a condition of exception that no body corporate is the holder of any of the shares or debentures. There is no reason to strain this exception in favour of banking or finance companies, for the exception is introduced not for their benefit but for the benefit of the company whose exemption is in question.

The plaintiffs' contention that the scheme was by arrangement with the company since it initiated the scheme is accepted. However, the words "providing capital" in the title to paragraph 7, which may be looked at to show the scope of the paragraph, mean providing capital for the company, and it is a misnomer to say that the purchase of shares from a shareholder is a provision of capital for the company. "Capital" is used in the company sense.

The words "in the ordinary course of its business as such" in paragraph 2 (2), read in conjunction with the definition of a banking or finance company in paragraph 9, show that the shares or debentures must be acquired by the banking or finance company in the course of its business of lending money or subscribing for shares. An "interest" in shares or debentures in paragraph 7 is referable to an interest in shares or debentures acquired in this way; "acquired" is used rather than "subscribed" as it covers debentures as well as shares, and the obtaining of a partial as well of a complete interest in the shares or debentures.

"Any" in the proviso is used in the sense of "no matter "which" or "whatever," as in article 58 of Table A. It does not prima facie mean "all," as it does in section 132 (1). If "all" were intended by Parliament it would have used that word or else "general meetings" as it did in section 132 (1).

Sir Milner Holland Q.C. in reply. Regard must be had to the context to see if "any" means "all." The sensible business man in answer to the question: Is there a power of voting at any general meeting? would reply: Not at all meetings but at some. The heading to paragraph 7 cannot limit the scope of the paragraph for the wording of the paragraph is plain and the heading can only be looked at to resolve a doubt.

Cur. adv. vult.

December 7. CROSS J. read the following judgment: The question raised by this summons is whether the plaintiff company, Qualter, Hall & Co. Ltd., is an exempt private company within the meaning of section 129 of the Companies Act, 1948, which exempts certain private companies from the requirements laid down by section 127. One of the conditions of exemption is that the conditions contained in the Seventh Schedule to the Act are satisfied as to the persons interested in the company's shares and debentures. The parts of the Seventh Schedule which are relevant to this case are paragraphs 1, 2, 7 and 9. [His Lordship read those paragraphs, stated the facts and continued:]

The advisers of the company clearly did not expect that its status as an exempt private company would be affected by this transaction.

The Board of Trade, however, has taken the view that as from July 22, 1955, the company ceased to be an exempt private company (a) because paragraph 7 only applies to cases in which the banking or finance companies provide capital for the company and not to cases such as this where the shares are bought from shareholders who are entitled to have them allotted to themselves, or, alternatively, (b) that in any event the proviso to paragraph 7 applies in this case since the banking and finance companies in question have the right to exercise more than one-fifth of the total voting powers at general meetings of the company called to consider such resolutions as are expressly referred to in article 72.

On the first point, counsel for the company contended that the words in paragraph 7 " acquired the shares or debentures or " its interest therein . . . by arrangement with the . . . company " or its promoters " naturally included a purchase of the shares or debentures or of some interest in them from the holders by arrangement with the company as well as an issue of shares or debentures by the company in consideration of money paid to it; that had it been the intention of Parliament to confine the exception to the latter case it would not have used such vague words as " acquired by arrangement with the company " but would have spoken of subscribing for shares or debentures; that the reference to an acquisition of an interest in the shares or debentures was inappropriate to the limited construction contended for by the Board of Trade; and, finally, that though there might possibly be cases of purchases of shares from shareholders which would not fall within the exception because the shares had not been acquired by arrangement with the company, the purchases in this case had been by arrangement with the company which had in effect initiated the whole scheme.

Counsel for the Board of Trade did not dispute that, if the company was otherwise right in its contention on this point, the acquisition of the shares in question in this case had been by arrangement with the company. He contended, however, first, that the words " provided capital " in the title to the paragraph meant provided capital for the company, and that the title defined the scope of the paragraph. He also contended that the words " in the ordinary course of its business as such " in paragraph 7, read in conjunction with the definition of a banking or finance company, showed that the shares or debentures must be acquired by the banking or finance company in the course of its business of lending money or subscribing for shares. He submitted that the reference to " an interest " in the shares or debentures was as consistent with the construction for which he was arguing as that for which counsel for the company was arguing, and that the word " acquired " was used rather than " subscribed " because a word was needed which would cover debentures as well as shares, and the acquisition of a partial interest as well as the whole beneficial interest in the shares or debentures in question.

I accept the submission of counsel for the Board of Trade as to the meaning of the words " providing capital " in the heading to paragraph 7. The words themselves are quite inapt to describe the payment of the purchase price of shares by a purchaser to his vendor, and appearing as they do in a Companies Act, they seem to me to relate simply and solely to the provision of capital for the company.

Counsel for the company suggested that if "providing "capital" means providing capital for the company, the company in this case obtained additional capital through the capitalisation of its reserves; but even if that operation could properly be described as a provision of capital, which I doubt, the provision was made by the company for itself, and not for it by the banking and finance companies, so that, even so, what was done here would not come within the scope of the title. But though a title to a section in an Act can give a clue to the meaning of an ambiguous passage in the section, it cannot control the meaning of the words used in the section if they are clear and unambiguous. (See *In re Penrhyn.*[1]) Then is this paragraph, read apart from the title, clear and unambiguous? I do not think so. If one reads into it, as one must, the definition of a banking or finance company, it is to my mind a question of doubt whether a purchase of shares by a finance company whose ordinary business includes purchasing shares as well as subscribing for them is or is not within it. Do the words "as such" in paragraph 7 refer, in the case of a finance company, to the words "the business of lending money or of subscribing for shares" in paragraph 9 or do they refer to the business of such a company as a whole provided only that that includes the business of lending money or subscribing for shares? I think that one can fairly look at the title of the paragraph for assistance in resolving this doubt.

Two further considerations incline me to accept the contentions of the Board of Trade in preference to those of the company on this point. The first is that section 129 creates an exception to a general rule, and should therefore in cases of doubt be construed against the party who relies on it. Secondly, I think that the construction contended for by the company might in some cases make the paragraph very hard to work. A purchase of shares in a private company can hardly in practice be carried through without the consent of the company; but what degree of approval or co-operation on the part of the company will justify one in saying that the shares have been acquired by arrangement with the company? If the meaning is doubtful the court can, I think, fairly put on this paragraph a meaning which makes it

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[1] [1923] 1 Ch. 143, 147; 39 T.L.R. 116.

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Cross J.

easily workable by the Registrar of Companies in preference to one which might give rise to many difficult borderline cases.

In view of the conclusion which I have reached on the first point, it is not strictly necessary for me to deal with the proviso to paragraph 7, but as this case will probably go further, I think that I ought to express a view on it. The question turns, of course, on the meaning to be given to the words " any general meeting." Do they mean any and every general meeting or any one general meeting out of many possible general meetings? Section 132 (1) of the Companies Act, 1948, contains the words " the total voting rights of all the members having . . . a right to " vote at general meetings of the company." Both sides agree that this means at all general meetings of the company. Here on the other hand (as in section 195 (10) (*b*) of the Act) the reference is to the right to exercise some fraction of the voting power " at any general meeting."

Counsel for the Board of Trade argues that Parliament would not have used different words to say the same thing, but I do not think that one can attribute much weight to this sort of argument when dealing with a document as long and complicated as the Companies Act, 1948. I prefer to ask myself what answer the directors of these finance companies would give to the question " Have you between you the right to exercise one-fifth or " more of the voting power at any general meeting of this com- " pany? " I think that they would answer " No, not as things " are. If the preference dividend falls into arrear, then we shall " have that right, but at present we can only control one-fifth " or more of the voting power at a general meeting called exclu- " sively for the purpose of considering resolutions of the types " mentioned in article 72 (b)." I do not think that they would treat the question as meaning: " May there be a general meeting " of this company at which you will have the right to exercise " one-fifth or more of the voting power? " I appreciate that to construe " any " as meaning " any and every " makes it very easy for a company which wishes to do so to evade the proviso by giving a finance company voting control on all issues which are likely to arise while withholding it on some matters of no moment. But putting the matter at its highest against the company, the word " any " is ambiguous, and, since it occurs in a proviso to an exception, the benefit of any doubt as to its meaning should, I think, be given to the company rather than to the Board of Trade. If, therefore, I had thought that this case fell within the

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exception, I should not have held that it was taken out of it by the proviso. As it is, however, I shall declare that the company ceased to be an exempt private company as from July 22, 1955.

Order accordingly.
No order as to costs.

Solicitors: *Biddle, Thorne, Welsford & Barnes for Wake, Smith & Co., Sheffield; Solicitor, Board of Trade.*

M. G. T.

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Dec. 9, 12, 13.

Lord Evershed M.R., Harman and Donovan L.JJ.

Revenue—Income tax—Employment—Perquisite—Valuation—Cost or value in hands of recipient—Gift from employer of new suit of clothes—Whether employee taxable on second-hand value only of suit —Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *Sch.* 9, *r.* 1.

In 1955 the directors of a company decided to offer as a gift to each of their employees a suit, overcoat or raincoat made to the company's order by a named tailor as a Christmas present. They requested the tailor to give each employee, who accepted the offer, a fitting and invited each such employee to call at a branch of the tailor and be fitted with a suit, overcoat or raincoat as he chose up to the value of £15. The bills were to be sent to the company. The taxpayer, one of the employees, called at a branch of the tailor, was accordingly fitted with a suit, and in due course received it. His suit cost £14 15s., which sum the company paid. A sum of £14 15s. in respect of the suit was included in an assessment made on the employee under Schedule E of the Income Tax Act, 1952,[1] for the year 1955 to 1956, as part of the "perquisites or profits" arising from his employment. The taxpayer appealed to the special commissioners, who held that the amount to be included was not £14 15s., but the value of the suit in his hands, on the footing that he could immediately have sold it only as second-hand, which value was agreed at £5:—

Held, that the taxpayer never acquired any rights either against his employers or against the tailor supplying the suit, and that

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[1] Income Tax Act, 1952, Sch. 9, r. 1: "Tax under Schedule E shall "be annually charged on every per- "son having or exercising an office "or employment of profit mentioned "in Schedule E, or to whom any "annuity, pension or stipend charge- "able under that Schedule is payable, "in respect of all salaries, fees, "wages, perquisites or profits what- "soever therefrom for the year of "assessment. . . ."

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this was not a case where the taxpayer was entitled to call on his employers to pay a sum of money on his behalf. Until the taxpayer received his suit, he got nothing, and when he received it, the thing he received expressed in money's worth was the value of the suit—viz., what he could get for it if he sold it as soon as he received it (post, pp. 144–145, 147)—and it was on that value (£5) that he was taxable under Schedule E.

Nicoll (*Inspector of Taxes*) v. *Austin* (1935) 19 T.C. 531 and *Hartland* v. *Diggines* [1926] A.C. 289; 42 T.L.R. 262; 10 T.C. 247, H.L. distinguished.

Decision of Danckwerts J. [1960] Ch. 437; [1960] 2 W.L.R. 515; [1960] 1 All E.R. 650 affirmed.

APPEAL from Danckwerts J.[2]

The taxpayer, S. A. Rogerson, appealed to the special commissioners against an assessment made on him under Schedule E of the Income Tax Act, 1952, for the year 1955–56 in the sum of £1,035 on the ground that a sum of £14 15s., paid by his employers for a suit bought by them as a present to him and supplied to him by Montague Burton Ltd., was wrongly included in computing the amount of his salary, fees, wages, perquisites or profits within the meaning of rule 1 of Schedule 9 to the Act.

The following were among the facts found by the special commissioners: The taxpayer was for the whole of the material year an employee of a company, the Anglo-Oriental and General Investment Trust Ltd. His duties were almost exclusively secretarial and were performed solely at the head office of the company at 55–61, Moorgate, E.C.2, and he was remunerated for his employment by a salary and, at the discretion of the directors, bonuses based on salary. The bonuses were usually paid to him in June and before Christmas in each year. In the material year, 1955–56, he received his usual bonuses and there was no issue before the special commissioners as to his liability to be assessed under rule 1 of Schedule 9 to the Act in respect of that salary and those bonuses.

In 1955 the board of directors of Anglo-Oriental decided to give to all its male staff, other than executives, a Christmas present up to the value of £15 of clothes, suitable for wear at the office, drawn from a choice from, or a combination of, a suit, overcoat or raincoat; the clothes to be purchased by Anglo-Oriental from Montague Burton Ltd. (hereinafter called "the tailors"). A letter to this effect was sent by Anglo-Oriental to the tailors on November 7, 1955, and the taxpayer's name was on a list of 22 employees whose names were supplied to the tailors. The letter constituted a formal order to the tailors to supply the goods on behalf of the individuals named in the list and contained the following instructions: " Please supply these with suits, overcoats " or raincoats as above and send us your account in due course. " We stress that the bill will be paid by this company and no cash " payment either way can be made between £15 and the actual " cost of the clothes. We have advised the staff to call on you " on or after Thursday, November 10, 1955, to choose a cloth and " to be measured etc., and trust that this will be convenient to " you." On the same date, namely, November 7, 1955, a letter was sent to the taxpayer in similar terms to the letter sent to the tailors. The last paragraph was as follows: " Messrs. Montague " Burton will provide a fitting if this is required and asked for. " They will also make alterations if required. Both fittings and " alterations will take additional time." The tailors' account for goods supplied to 21 employees of Anglo-Oriental (one name having been removed after November 7, 1955), was rendered to Anglo-Oriental on February 29, 1956, and included goods supplied to the taxpayer to an amount of £14 15s. The account was paid by Anglo-Oriental on the same date. On receipt of the letter from Anglo-Oriental, the taxpayer called at the tailors' Cheapside premises and was in due course supplied with a suit. This was his own choice and he could have selected an overcoat or raincoat instead of a suit. Thereafter, he continued as previously to buy suits for himself from another tailor and paid more than £14 15s. for them. On average, he wore the suit made by the tailors once or twice a week at the office on ordinary working days. It was his usual custom, when he returned home, to change his suit, whether supplied by the tailors or otherwise, and to wear less formal clothing. He anticipated, however, that the suit supplied to him by the tailors would be discarded sooner than his other suits because, owing to its lower quality and cut, it would become shabby more quickly. There was no condition in writing or orally as to a refund to Anglo-Oriental if he left their employment before the suit was worn out. There was no evidence that Anglo-Oriental had forbidden the taxpayer to sell the suit, but he entertained no doubt that they would have been displeased if he had done so: in any event he had made no such attempt. Shortly after the suits were supplied by the tailors to the taxpayer and his other colleagues, one of the directors or other officials of Anglo-Oriental made a point of inspecting them.

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[2] [1960] Ch. 437; [1960] 2 W.L.R. 515; [1960] 1 All E.R. 650.

It was contended for the Crown that the taxpayer received in the year 1955–56, in addition to the cash emoluments of his employment, an advantage by virtue of that employment which was money's worth, namely a suit of clothes; that, on the evidence, that advantage of money's worth fell to be measured by the price paid by Anglo-Oriental to the tailors for the suit, that was, the sum of £14 15s.; that that sum was correctly included in computing the amount of the salary, fees, wages, perquisites or profits of the taxpayer from his employment within the meaning of rule 1, Schedule 9 to the Income Tax Act, 1952; and that the assessment for the year 1955–56 ought to be confirmed.

It was contended for the taxpayer that, on the evidence, the value of the suit was not salary, fees, wages, perquisites or profits of the taxpayer from his employment within the meaning of rule 1 of Schedule 9 to the Income Tax Act, 1952; that the suit was not an advantage received by him by virtue of his employment which was capable of being turned into money, because his employers would have been displeased if he had sold it; alternatively that, if the value of the suit was an advantage received by him by virtue of his employment which was capable of being turned into money, the value was not the price paid by Anglo-Oriental to the tailors, namely, £14 15s., but the sum which he could have raised by the sale of the suit in November, 1955, and that that sum was very small; and that no sum, or, in the alternative, a very small sum, should be included in respect of the sum in computing the amount of his emoluments from his employment for the year 1955–56.

The special commissioners considered that in the year 1955–56 the taxpayer received, in addition to the cash emoluments of his employment, an advantage by virtue of that employment which was capable of being turned into money, but were, however, unable to accept the Crown's contention that that advantage was the price paid to Montague Burton for the suit, and they held that the money's worth of the suit must be valued by reference to the market value when it became the appellant's property, such value being the second-hand value in November, 1955. No evidence was before the commissioners as to the second-hand value of the suit and the case was set down for a further hearing.

Subsequently, it was reported to the special commissioners that it had been agreed between the Crown and the taxpayer that the taxpayer could have sold the suit unworn in November, 1955, for the sum of £5, and, accordingly, the special commissioners reduced the assessment to £1,027.

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Danckwerts J. affirmed the decision of the special commissioners, holding that the benefit which the taxpayer received was the value of the suit in his hands and that value, £5, was the amount which should be included in his taxable income for the purposes of Schedule E.

The Crown appealed.

Hilary Magnus Q.C., *E. Blanshard Stamp* and *Alan Orr* for the Crown. It is conceded that the gift of the suit gave rise to the receipt of a taxable perquisite or profit within Schedule E. The sole issue is as to quantum. Only where there is no money payment is it necessary to consider whether an emolument is capable of being converted into money, e.g., *Abbott* v. *Philbin* (*Inspector of Taxes*).[3] The taxpayer submits that the value of the suit is the price which he could get for it in the open market if he sold it immediately he received it. The Crown contends that the value of the suit as a perquisite is the sum paid for it by the company. The commissioners decided in favour of the taxpayer that the value was £5.

If a payment is made to a third party by arrangement with the employer for the benefit of his employee that is as much for the benefit of the employee as if it was paid direct to him. The fundamental question is whether the employee receives a benefit in cash or in kind. On one side of the line is the case where an employee receives, for example, one of a fleet of his employer's cars; it could not be said that the amount originally spent was expressly for his benefit; when made it was for the employer's benefit. On the other side of the line is the type of case where the employer undertakes to maintain payments to travel agencies for holidays for employees. The present case is on that side of the line. It is relevant that the taxpayer was told the amount of the gift. It might be different if he had been told to choose from a range of clothing without specifying the amount.

The relevant facts are that here there was a money payment, which was the price of the suit chosen and supplied to the taxpayer. Secondly, the company told the taxpayer of their intention to pay the tailor up to £15 to enable the taxpayer to choose and be fitted with a suit. This was an arrangement between the company and the taxpayer involving an invitation to the taxpayer to go to a tailor and be fitted and supplied with a suit at a defined cost to the employer. It was an invitation which was accepted and acted on. The moment the suit left Montague Burton's, it became the property of the taxpayer. On these facts, the commissioners were manifestly wrong in holding that this was a gift of a suit. There was never any specific suit transferred from the company to the taxpayer. *Hartland* v. *Diggines* [4] was not referred to before the commissioners. It is closely in point. General and comprehensive words were there used. Lord Cave L.C. said that if the effect of a payment was to procure value, that is, money's worth, for the employee, then the payment was taxable. It is the payment which was taxable, not the thing which was produced by the payment. That statement is not only applicable in the type of case where money's worth happens to take the place of the discharge of a money liability. [Reference was made to *Weight (Inspector of Taxes)* v. *Salmon.*[5]] In *Nicoll* v. *Austin,*[6] the ratio was not that the company was discharging an employee's obligation. It was based on *Hartland* v. *Diggines,*[7] and it is clear that what the court was saying was that the cash payment produced money's worth for the employee.

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[3] [1960] Ch. 27; [1959] 3 W.L.R. 739; [1959] 3 All E.R. 590, C.A.

Where trustees raise part of the corpus of a fund for the purpose of increasing the income of a cestui que trust that is analogous to this case. The source of the income is the trustees' discretionary power to raise money from the corpus for maintenance, and money derived from that source is as much taxable as money derived for the employer and paid to the third party for the benefit of the employee. The cestui que trust is taxed on the money's worth applied for his benefit and not on the worth of the thing procured by the expenditure. Money applied for the benefit of the beneficiary is as much a benefit as money paid direct to him. [*Lindus and Hortin* v. *Inland Revenue Commissioners* [8] was referred to.]

Where an employer offers to expend money for an employee, the employee is taxed on the amount expended and not on the value of the thing provided. The price which it would fetch if sold in the open market is not a relevant consideration. In *Nicoll (Inspector of Taxes)* v. *Austin,*[9] Finlay J. held that the outgoings and the expenses of the upkeep of the taxpayer's house and garden, paid by his employers, were money's worth and a perquisite of the employee and taxable, although the payments did not produce anything which the taxpayer could turn into money. In this respect there is nothing which suggests that the gardener was employed and paid by the employee. In *Hartland* v. *Diggines*,[10] Lord Cave L.C. said, in regard to the payment of an employee's income tax by his employers, that while he did not receive cash he received money's worth and was accordingly properly assessed to tax in respect of the amount of income tax paid on his behalf. The solution of the problem depends on what is meant by the receipt of money's worth. In *Tennant* v. *Smith*,[11] the question was whether a bank official's obligation to live on the bank premises was a perquisite or profit of his office. It was there held that the occupation of the bank premises was not so taxable, since it could not be turned to pecuniary account. That decision must be considered in the light of its facts. There was there no money payment for the employee's benefit.

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[4] [1926] A.C. 289; 42 T.L.R. 262; 10 T.C. 247, H.L.

[5] (1934) 51 T.L.R. 333; 19 T.C. 174.

[6] (1935) 19 T.C. 531.

[7] [1926] A.C. 289.

[8] (1933) 17 T.C. 442.

[9] (1935) 12 T.C. 531.

In the present case the taxpayer did not get the gift of a specific suit. What he did get was a money payment made on his behalf, which was money's worth equal to the sum paid. The fact that the end product of the transaction was a suit does not matter. The employers' liability to spend £14 15s. arose when the taxpayer accepted their offer. The money's worth he received was not the suit but the sum paid for it. In *Ede* (*Inspector of Taxes*) v. *Wilson* [12] and *Weight* (*Inspector of Taxes*) v. *Salmon*,[13] no cash payment was in fact made to the employee, but in each case a right to subscribe for shares at less than the market price was held a taxable perquisite. Danckwerts J.,[14] in his judgment, said that where an employee had received something which was in his hands, the perquisite he received was the value of what he had got. Where it was not possible to measure the value of what the employee had received, the payment made was the standard for assessing the tax. It is submitted that *Nicoll* v. *Austin* [15] is not an authority for that proposition; it was not decided on the ground that the payments made by the employer could not have any money's worth. Nor was that the ratio of the decision in *Cordy* (*Inspector of Taxes*) v. *Gordon*.[16] There is no decision directly in point here. [Reference was made to sections 160, 161 and 163 of the Income Tax Act, 1952.]

F. Heyworth Talbot Q.C. and *C. N. Beattie* for the taxpayer. The Crown's case rests on the false premise that when an employer makes a payment to a third person in order to procure a benefit for his employee, it is the payment made to the third person that constitutes the emolument of the employee. The true principle is that what constitutes the income of the employee is not the payment but the money's worth produced by the payment. In some cases the money's worth cannot be different from the payment. In the case of the gift of a book voucher there is no problem. The face value of the voucher is the benefit. The subject-matter of the gift is what the donee chooses. The position would not have been different here if the suit had been in the first instance delivered to the company. The suit itself was the money's worth. If that is right the Crown's case fails on authority. In *Tennant* v. *Smith*,[17] the employee acquired a right to occupy a house but he could not part with the possession of the house. This is like the share case of *Ede* (*Inspector of Taxes*) v. *Wilson & Cornwell*.[18]

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[10] [1926] A.C. 289, 292, H.L.

[11] [1892] A.C. 150, 159; 8 T.L.R. 434; 3 T.C. 158, H.L.

[12] (1945) 26 T.C. 381; [1945] 1 All E.R. 367.

[13] 19 T.C. 174.

[14] [1960] Ch. 437, 443.

[15] 19 T.C. 531.

[16] [1925] 2 K.B. 276; 41 T.L.R. 401; 9 T.C. 304.

In this case there was no privity of contract between the taxpayer and the tailors. The whole issue is what is the money's worth which the taxpayer got, was it the payment which the employers made or was it the benefit which the taxpayer got from the payment. What the employer pays does not lead directly to a benefit of a similar amount to the taxpayer. It is submitted: (1) that for a benefit derived from an office or employment to be taxable the benefit must be money or money's worth. That is the principle of *Tennant* v. *Smith*[19]: see *per* Lord Watson. That principle has not been qualified by any subsequent authority. But later decisions do show that the test of convertibility is not exhaustive. In *Hartland* v. *Diggines*,[20] there was no question of convertibility. The decision was based on the conclusion that money's worth came to the employee by the payment of his income tax. He was relieved from the burden of the tax. In *Nicoll* v. *Austin*,[21] the taxpayer was relieved from the payment of telephone charges and rates and household and garden upkeep expenses. There was no question of convertibility there. Here, what the taxpayer received was a suit of clothes and until he received it there had been no gift. It is the worth of the suit in the hands of the employee which is taxable. A valuation problem only arises where the emolument takes the

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[17] [1892] A.C. 150; 8 T.L.R. 434; 3 T.C. 158, H.L.

[18] (1945) 26 T.C. 381; [1945] 1 All E.R. 367.

[19] [1892] A.C. 150, 159, H.L.

[20] [1926] A.C. 289, H.L.

[21] 19 T.C. 531.

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form of an article. It is submitted (2) that a perquisite or emolument in the form of an article is only taxable if it can be turned to pecuniary account: see *Tennant* v. *Smith*,[22] *per* Lord Watson. A suit of clothes is a perquisite, because it is capable of being sold. Its sale price is agreed to be the sum of £5 and that is the sum which is taxable.

Hilary Magnus Q.C. in reply. On the facts of this case the taxpayer did not get a specific suit but £15's worth of the tailor's stock. That was a right to the payment of a sum of money and it is that sum which is the perquisite here.

LORD EVERSHED M.R. The point involved in this appeal falls indeed within the narrowest compass; but it is, or appears to be, novel in the sense that no strictly comparable case seems to have come before the court before.

Mr. Rogerson, the respondent, at the relevant date in 1955–56 was in the service of a company known as the Anglo-Oriental & General Investment Trust Limited. As the season of goodwill approached in the year 1955 the company, of which he was the servant, wrote to him, and to some twenty or twenty-one fellow servants, a letter which, so far as material, was as follows: "The Board have decided to make a Christmas present to all "male members of the staff of clothes suitable for wear at the "office up to the value of £15. Arrangements have been made "with Messrs. Montague Burton Ltd., 112, Cheapside, E.C.2, "for you to be able to acquire from them a choice from or "combination of the following: Suit, overcoat, raincoat. The "bill will be sent to the Trust, and it is stressed that no cash "payment either way can be made between £15 and the actual "cost of the goods.

"Please take this letter with you when you visit Messrs. "Montague Burton, which can be done on or after Thursday, "November 10, 1955. Messrs. Montague Burton will provide a "fitting if this is required and asked for. They will also make "alterations if required. Both fittings and alterations will take "additional time."

On the same date the company wrote to Montague Burton Ltd. of 112, Cheapside, and the letter is as follows: "We write "with reference to the visit of Mr. W. Peter Spens on November "4, 1955. This company, a subsidiary of London Tin Corporation "Ltd., has decided to give its male staff a Christmas present

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[22] [1892] A.C. 150, 159, H.L.

"(purchased from Messrs. Montague Burton Ltd.) up to the "value of £15 of clothes suitable for wear at the office drawn "from a choice from or combination of a suit, overcoat or raincoat. We enclose a copy of a letter which we will write to "each male member of the staff whose names are given below," and then there follows the list of names. "Please supply them "with suits, overcoats or raincoats as above, and send us your "account in due course. We stress that the bill will be paid by "this company, and no cash payment either way can be made "between £15 and the actual cost of the clothes. We have "advised the staff to call on you on or after Thursday, November "10, 1955," etc.

The only other document to which I need refer is a receipt in favour of the company in February of the following year for a total sum of £311 12s. 6d. which was the cost of the suits, overcoats or raincoats which had been supplied to the various members of the company's staff.

It has been necessary to read in full those documents because, in the end, much turns upon the exact nature of what was done. The taxpayer availed himself of the generosity of his employers, and acquired clothing from Montague Burton for which the bill was delivered to the company, the price in his case being not quite £15, but £14 15s.

The claim of the Crown has been that that figure, £14 15s., is to be treated as part of the taxable income of the taxpayer for the tax year in question. It is said that it falls within the terms of paragraph 1 of the Ninth Schedule to the Income Tax Act, 1952: "Tax under Schedule E shall be annually charged on every "person having or exercising an office or employment of profit "mentioned in Schedule E or to whom any annuity, pension or "stipend chargeable under that Schedule is payable, in respect "of all salaries, fees, wages, perquisites or profits whatsoever "therefrom for the year of assessment. . . ." It is the Crown's case that the £14 15s. must be treated as a perquisite or profit from the employment for the year of assessment 1955–56.

On behalf of the taxpayer it was said that any perquisite or profit was limited in this case to the value expressed in money of the thing which he got, namely, the clothing. For the purposes of this case, the value of the clothing, treated, of course, as second-hand the moment it had been delivered, has been agreed at £5. Let me say at once that this involves no reflection upon Messrs. Montague Burton Ltd., who are not before the court;

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and it should not, of course, be assumed that goods which they supply are worth only one-third of the price which they charge. But it is, of course, notorious that, apart from purchase tax, the value of clothing is very much reduced the moment it can be called second-hand. In any case, the value is one which has been mutually accepted and agreed, and nothing turns upon it. It may have been agreed at a low figure to discourage any cross-appeal by the taxpayer. If so, it has achieved its purpose, for it is now accepted on his behalf that he is rightly taxed, as the judge in the court below held, upon the money value of what he got.

I can now state again the point: What must be regarded for the purpose of the paragraph in the Ninth Schedule of the Act as the perquisite or profit from the taxpayer's employment? The case for the Crown, which Mr. Magnus presented with clarity and attraction, can I think be summarised in the way in which he put it at the end of his argument: "I say" (and I read from my note of the argument) "that where the employee accepts an offer "from his employer to spend money on his behalf, then he is "chargeable on the money spent, and not on the value of the "thing bought for him."

If that is a correct statement of the true nature of this transaction, it may be that the conclusion follows. Mr. Magnus referred to a few cases—gratefully, may I say, we were not given a great many to read—one of which is the case of *Nicoll* v. *Austin* [1] before Finlay J. In that case a director of a company was told that, in order to do justice to his standing in the company, he should continue to live at a place called Debden Hall, but his employer, as part of the bargain of service, promised to pay the charges incurred for its use, such as rates and telephone charges, and also the cost of maintaining the gardens. In that case it was held that what Mr. Austin had got from the arrangement in money's worth was the sums which were paid for rates and telephone charges, and also the sums paid for the gardener's wages and the like as regards the gardens.

In the case of *Hartland* v. *Diggines*,[2] an employing company had agreed to pay the income tax on its employee's salary; and there the House of Lords likewise held that the tax so paid must be treated as within the scope of the paragraph of the Schedule. Mr. Magnus's argument was that when this case is viewed, according to his argument (as I have stated it), the same reasoning would compel a similar answer to that given in *Nicoll* v. *Austin*[3] and *Hartland* v. *Diggines*.[4]

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[1] (1935) 19 T.C. 531.

[2] [1926] A.C. 289; 42 T.L.R. 262; 10 T.C. 247, H.L.

I have said that the point is a very short one, and I think it does not lend itself to elaboration. I reject the premise involved in Mr. Magnus's formulation. It is no doubt true, in a sense, to say that the letter of November 7 was an offer, and one which the person to whom it was addressed was not bound to accept. Indeed, anyone who proposes to give a present to somebody else may find that the somebody else says: "I will not have it." But in the submission which Mr. Magnus has formulated, the word "offer," I think, is used in a sense in which it would be used in a legal context. The suggestion is that here was an offer which, on acceptance, created some right; and it is at that point that I venture to part company with Mr. Magnus.

It seems to me that the taxpayer never acquired any rights against anybody. He received this letter; armed with it, he went to Messrs. Montague Burton's establishment, and Montague Burton expressed themselves as willing to supply him with the clothes he ordered. When the clothes were delivered, then (and then only) the taxpayer got something which was his own. He acquired at that point of time a suit, albeit he had no right against anyone to get the suit. Nor had he, as I conceive, any right against the company, though as a matter of ordinary decency as between master and servant he could no doubt rely upon the company doing what they said they would do. But this was not a case in which he was entitled to call upon the company to pay some sum of money on his behalf, as that phrase is ordinarily understood.

If I have incurred a debt—for example, my debt due for income tax comparable to *Hartland* v. *Diggines*[4]—and my employer chooses to discharge that debt for me, then it is no doubt true that what I have received in money or money's worth is the equivalent of the debt; and the sum of money is, therefore, properly brought within the scope of the charge. But as I think in this case, and in accordance with Mr. Heyworth Talbot's argument, what the taxpayer got—what the company intended to give him, what the letter to him and Montague Burton said would be done, and was done—was a present of a suit. Until he got it, he got nothing; and when he got it, the thing which came

[5] 19 T.C. 531.

[6] [1926] A.C. 289.

in (which was his income expressed in money's worth) was the value of the suit.

As I have said, I do not propose to elaborate it because I think it would be of no service either in this, or in other cases. I agree, therefore, with Danckwerts J. when he said that, on grounds which I have also tried to express, the case is distinguishable from *Nicoll* v. *Austin*.[5] So far as the rates and telephone charges in that case were concerned, the result was on all fours with the decision in *Hartland* v. *Diggines*,[6] where the employer discharged a liability or an obligation of the servant. Strictly, that might not be true as regards the gardens. The facts in regard to that case are not known. We do not know who in fact employed the gardener. But, as the judge pointed out, there is no doubt that Mr. Austin got the benefit; and there may well be no other way of assessing the value than by reference to what was in truth paid for the upkeep of the garden. This case, as I think, is different. We are here concerned with the present of a suit; that is the subject-matter; and the value of the suit in money seems to me to be the amount for which the taxpayer is properly taxable.

I would, therefore, dismiss the appeal.

Harman L.J. I agree. The taxpayer here does not dispute his liability. He agrees that he has received from his employer a perquisite, or something of that nature, which made him chargeable under Schedule E. The only controversy was whether he was to pay tax on the cost of that perquisite to his employer, or the value of it to him, and it appears to me that this perquisite is a taxable subject-matter because it is money's worth. It is money's worth, because it can be turned into money, and when turned into money the taxable subject-matter is the value received. I cannot myself see how it is connected directly with the cost to the employer. It is quite true that in *Hartland* v. *Diggines*,[6] for instance, the employer made certain payments of money for the employee's benefit. Well, the only way in which you can make a valuation of money is by money. It is not like a chattel, which is the case here, and therefore there was no difference in the standard of what was paid by the employer, and the advantage received by the employee.

Here there is a difference. It is admitted that as a conventional matter the difference can be taken as that between

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[5] 19 T.C. 531.

[6] [1926] A.C. 289.

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£14 15s. and £5. Income tax is a tax levied on income. The taxpayer has to pay on what he gets. Here he has got a suit. He can realise it only for £5. The advantage to him is, therefore, £5. The detriment to his employer has been considerably more, but that seems to me to be irrelevant, and I do not see that it makes any difference that no property in this suit ever passed to the employer.

I think, in Lord Watson's words in *Tennant* v. *Smith*,[7] that it is a benefit consisting in "something acquired which the acquirer "becomes possessed of and can dispose of to his advantage—in "other words, money, or that which can be turned to pecuniary "account." This can be realised in cash, and it is that realisable quality which is the measure of the taxpayer's liability.

I would therefore dismiss the appeal.

DONOVAN L.J. I agree, and I add a few words only because of the novelty of the point.

The case wears an aspect of triviality which is deceptive. Tax on £15 alone is involved, but the proposition on which the claim is based is of much wider significance, and it will look very different when applied to other cases which can easily be foreseen, and some of which were referred to during the argument.

The proposition was stated thus: Where an employer offers to spend money for an employee as a reward for service; and that offer is accepted, the employee is liable to be taxed on the money so spent, and not on the thing which the money provides for him. A good many qualifications would need to be added to that proposition to make it true. It looks true in cases like *Hartland* v. *Diggines*[8] and *Nicoll* v. *Austin*,[9] where money liabilities of the employed officers were discharged by the employer. But what the officers were really taxed upon was the money's worth of the immunity they were thus given from their own liabilities. No valuation of that money's worth was required, it was obviously of the same value as the liability which had been discharged.

In the present case the taxpayer never became liable to pay the £14 15s. to Messrs. Montague Burton. Between him and them there was no privity of contract at all; and when the employers paid this sum, they discharged their own liability, and nobody else's.

On what principle is this payment nevertheless to be treated as the taxpayer's income? To that question, I think, no satisfactory answer is or can be given. At first the Crown suggested that it was the principle underlying certain surtax cases where taxed income had been applied under a trust for the benefit of the beneficiaries; but the court in those cases explained that once the trustees so applied the income, that income itself became the beneficiaries'; see, for example, the case of *Sutton* v. *Inland Revenue Commissioners*.[10] In the end the Crown conceded (I think rightly) that no true analogy could be drawn between that class of case and the present.

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[7] [1892] A.C. 150, 159; 8 T.L.R. 434, H.L.

[8] [1926] A.C. 289.

[9] 19 T.C. 531.

That being so, I can discover no test which yields the result that the payment by the employer to Messrs. Montague Burton in the circumstances of this case is the income of the employee.

In that situation one must get back to what has always, so far as I know, been accepted as the basis of liability under Schedule E, namely, that liability extends to the profits or gains arising or accruing to the holder of the office or employment as such, whether those profits take the form of money, or money's worth. No money arose or accrued to the taxpayer here from this transaction. Money's worth did, in the shape of the suit. The suit (and the suit alone) answers the description of profit accruing to the employee from his employment. On that basis it should be assessed to income tax at its money value in the taxpayer's hands, that is to say, what he could get for it if he sold it as soon as he received it. It is agreed between the parties that this is the sum of £5; and I therefore also think that the special commissioners and Danckwerts J. came to the right conclusion in this case, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Slaughter & May.*

B. A. B.

[10] (1929) 14 T.C. 662; 45 T.L.R. 565, C.A.

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Dec. 1, 2, 5, 6, 20.

Lord Evershed M.R., Harman and Donovan L.JJ.

GROSVENOR PLACE ESTATES LTD. *v.* ROBERTS (INSPECTOR OF TAXES).

Revenue—Income tax—Deduction at source—Failure of payer to deduct tax—Whether recipient of payment chargeable—Rent—Schedule D—Long lease—Statutory duty of tenant to deduct tax—Payment of rents without deduction—Whether landlord properly assessed to tax—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 6, 36, 148, 170 (1) (2); 177 (1) (2).

The tenant of premises under a "long lease" within section 177 of the Income Tax Act, 1952,[1] made to the landlords, without deduction of tax, payments of rent chargeable to tax in accordance with

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[1] Income Tax Act, 1952, s. 6: "(1) All matters relating to the income tax under Schedules A, B and D, so far as they are not directed by this Act to be executed by any other Commissioners, and, subject to any regulations under section 157 of this Act for the time being in force, all matters relating to the income tax under Schedule E so far as they are not executed by any other Commissioners, shall be executed, as heretofore, by the Commissioners for the general purposes of the income tax (in this Act referred to as 'General Commissioners'), who shall continue to act for the same separate areas as heretofore (in this Act referred to as 'divisions'):"

S. 36: "(1) Statements of profits or gains under Schedule D shall, unless an assessment thereon is required to be made by the Special Commissioners, be laid before the Additional Commissioners, and the Additional Commissioners shall appoint meetings for the consideration of all such statements as are from time to time delivered to them."

S. 148: "Tax under Schedule D shall be charged on and paid by the persons receiving or entitled to the income in respect of which tax under that Schedule is in this Act directed to be charged."

S. 169: "(1) Where any yearly interest of money, annuity or other annual payment is payable wholly out of profits or gains brought into charge to tax—(*a*) no assessment shall be made on the person entitled to the interest, annuity or annual payment . . . (3) Where—(*a*) any royalty or other sum paid in respect of the user of a patent; or (*b*) any rent, royalty or other payment which, under any of the provisions of this Act, is declared to be subject to deduction of tax under this Chapter as if it were a royalty or other sum paid in respect of the user of a patent, is paid wholly out of profits or gains brought into charge to tax, the person making the payment shall be entitled on making the payment to deduct and retain out of it a sum representing the amount of the tax thereon at the standard rate for the year in which the amount payable becomes due."

S. 170: "(1) Where—(*a*) any interest of money, annuity or other annual payment charged with tax under Schedule D; or (*b*) any royalty or other sum paid in respect of the user of a patent; or (*c*) any rent, royalty or other payment which, under any of the provisions of this Act, is declared to be subject to deduction of tax under this Chapter as if it were a royalty or other sum paid in respect of the user of a patent, is not payable or not wholly payable out of profits or gains brought into charge, the person by or through whom any payment thereof is made shall, on making the payment, deduct out of section 177 under Case VI of Schedule D to the Act and subject to deduction of tax under section 170. The special commissioners affirmed an assessment made under Schedule D on the landlords in respect of the receipt of rent, although an assessment could have been made on the tenants (though not on the landlords) under section 170 of the Act of 1952:—

Held (Lord Evershed M.R. and Donovan L.J.; Harman L.J. dissenting) that where the lessee under a long lease pays rent not payable out of profits or gains brought into charge and fails to deduct from such rent a sum representing the amount of the tax thereon at the standard rate in force in accordance with the provisions of section 170 (1) of the Income Tax Act, 1952, the Additional Commissioners for Income Tax may, under section 36, assess the lessor in respect of the rent so paid as being "profits or gains" liable to tax under Schedule D. The authority vested in the additional commissioners, before section 26 of the Finance Act, 1927 (now section 170 of the Act of 1952) was passed, to make assessment upon annual profits or gains not brought into charge to tax still remains, and section 170 has not cut down their powers and duties under section 36 (1) to make such assessments.

Per Lord Evershed M.R. The powers of assessment conferred by section 170 (3) on the special commissioners are discretionary and not obligatory; accordingly, the commissioners are not "required" to make an assessment on the lessee within section 36 (1), and the jurisdiction of the additional commissioners to make an assessment on the lessee is not affected (post, p. 164).

The decision in *Glamorgan Quarter Sessions* v. *Wilson* [1910] 1 K.B. 725; 26 T.L.R. 351; 5 T.C. 537, and the dicta of Upjohn J. in *Stokes* v. *Bennett* (*Inspector of Taxes*) [1953] Ch. 566, 573; [1953] 3 W.L.R. 170; [1953] 2 All E.R. 313; 34 T.C. 337 approved.

Per Donovan L.J. The power and the duty of the general commissioners to make assessments upon annual payments made out of profits and gains not brought into charge to tax still remains. This does not involve liability to double taxation, once by deduction at source and again by assessment upon the same income. It is true

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"it a sum representing the amount "of the tax thereon at the standard "rate in force at the time of the "payment. (2) Where any such payment as aforesaid is made by or "through any person, that person "shall forthwith deliver to the Commissioners of Inland Revenue, for "the use of the Special Commissioners, an account of the payment, "or of so much thereof as is not "made out of profits or gains brought "into charge, and of the tax deducted "out of the payment or out of that "part thereof, and the Special Commissioners shall assess and charge "the payment for which an account "is so delivered on that person. "(3) The Special Commissioners may, "where any person has made default "in delivering an account required "by this section, or where they are "not satisfied with the account so "delivered, make an assessment "accordingly to the best of their "judgment, . . . (4) All the provisions of this Act relating—(*a*) to "persons who are to be chargeable "with income tax and to income tax "assessments; . . . shall, so far as "they are applicable, apply to the "charge, assessment, collection and "recovery of income tax under this "section. . . ."

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that there is nothing in the Act expressly prohibiting such an injunction but the prohibition is implied in its provisions: see *per* Lord Davey in *London County Council* v. *Attorney-General* [1901] A.C. 26, 43; 17 T.L.R. 131; 4 T.C. 265, H.L. (post, p. 176).

Decision of Danckwerts J. [1960] Ch. 423; [1960] 2 W.L.R. 531; [1960] 1 All E.R. 643 affirmed.

APPEAL from Danckwerts J.[2]

A company, Grosvenor Place Estates Ltd., appealed to the special commissioners against assessments for the years 1955–56 and 1956–57 under Schedule D of the Income Tax Act, 1952, in respect of payments of rent received under an underlease granted by the company of premises known as Hobart House.

The following facts were proved or admitted before the commissioners:

The National Coal Board were tenants of Hobart House under an underlease for 81 years less four days granted from March 25, 1955, by the company at an annual rent of £96,177. That underlease was a "long lease" within section 177 of the Income Tax Act, 1952. The board made the following payments of rent without deduction of tax to the company: quarter ended June 25, 1955, £24,044 5s.; quarter ended September 29, 1955, £24,044 5s.; quarter ended December 25, 1955, £24,044 5s.; quarter ended March 29, 1956, £24,044 5s.; total £96,177. Quarter ended June 24, 1956, £24,044 5s.; quarter ended September 29, 1956, £24,044 5s.; total £48,088 10s. Those payments of rent were chargeable to tax in accordance with section 177 under Case VI of Schedule D to the Income Tax Act, 1952, and were subject to deduction of tax under either section 169 or section 170 of that Act.

That rent was not paid out of profits and gains of the National Coal Board brought into charge to tax and, accordingly, section 169 of the Act of 1952 did not apply to them. The payments of rent did fall under the provisions of section 170, under which the board should have deducted tax on payment and delivered an account of the payments to the Inland Revenue Commissioners for the use of the special commissioners, who, in the words of the section, "shall assess and charge the payment for which an "account is so delivered on that person," i.e., the person making the payment. The board, as stated above, omitted to deduct tax on payment.

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[2] [1960] Ch. 423; [1960] 2 W.L.R. 531; [1960] 1 All E.R. 643.

It was admitted by the Crown that the Inland Revenue Commissioners were informed of the payments made, but in what form that information was given was not proved or admitted. There was no evidence that an assessment had been made on the board, as the person paying the rents in accordance with the provisions of section 170, and much evidence to the contrary, and the special commissioners drew the inference that none had been made. The special commissioners were informed by counsel for the Crown, in reply to an inquiry by them, that it was not considered obligatory on the assessing special commissioners to make an assessment on the person making the payment, where that payment had been received by the payees in full without deduction of tax: it was considered open to the Revenue, in the existing state of the law, to make an assessment on the recipient in such circumstances, which had been done, and to make an assessment also on the board would create a double assessment of the same sum.

It was contended on behalf of the company that it was obligatory on the assessing special commissioners under the provisions of section 170 to assess the persons making the payment, that it must be assumed that such an assessment either had been or would be made by the commissioners in pursuance of their statutory duty and that, accordingly, an assessment could not be made on the company as payee.

It was contended on behalf of the Crown that the company, having received the rents in full without deduction of tax, was directly assessable.

The special commissioners held that they were bound by the decision in *Glamorgan Quarter Sessions* v. *Wilson*[3] and they, accordingly, dismissed the appeal and confirmed the assessments. They did not feel it incumbent on them, in the view that they took of the matter, to express any opinion on the apparent failure of the assessing special commissioners to assess the board.

The company appealed, the question of law for the decision of the court being whether, on the facts admitted or proved, the commissioners' decision was correct in law.

Danckwerts J. affirmed the decision of the special commissioners and held that assessments had been properly made on the landlords.

The landlords appealed.

Heyworth Talbot Q.C. and *C. N. Beattie* for the appellants, the landlords. The question is whether the landlords are directly assessable to tax in respect of the rent paid, without any deduction for tax, to them by the National Coal Board. The rent paid by the board was not paid out of profits and gains brought into charge to tax. Accordingly, since the board's lease was a long lease within section 177 of the Income Tax Act, 1952, section 170 applied and the board should have deducted tax before paying the rent. Section 170 is peremptory and mandatory in its terms. Subsection (1) states that the person making the payment "shall" deduct out of it a sum representing the amount of the tax thereon and subsection (2) states that he "shall" deliver to the commissioners an account of such payment. Subsection (4) applies for assessment purposes the general law of income tax. The Crown is under a statutory obligation now to assess the National Coal Board.

There are various bodies of commissioners concerned with income tax. The statute lays different obligations on these bodies. (1) The Commissioners of Inland Revenue, who are referred to in section 170, are the board at Somerset House. They have certain statutory functions, but the board has no power to make assessments. (2) The general and additional commissioners, the latter being an off-shoot of the former, make most assessments, unless the taxpayer asks to be assessed by the special commissioners. (3) The Special Commissioners of Income Tax perform various functions. They hear appeals, state cases and make assessments to surtax and can be called on by the taxpayer to make assessments in place of the general commissioners. Section 170 imposes on these commissioners the function of making assessments where annuities are not paid out of profits and gains already taxed.

Danckwerts J. might have decided this case otherwise but for the decision in *Glamorgan Quarter Sessions* v. *Wilson*,[3] and for the dicta of Upjohn J. in *Stokes* v. *Bennett* (*Inspector of Taxes*).[4] Those decisions are not binding on this court.

The two questions here are, who is to pay the unpaid tax in respect of these rents, and has the Revenue alternative remedies? If the payer fails to deduct tax, can the Revenue go against the payee? Under section 506 (2) an agreement for the payment of rent or other annual payment without deduction of tax is void. Originally the recipient of the rent was liable for the tax. The law was changed by section 24 (3) of the Customs and Inland Revenue Act, 1888, to make the payer of rent accountable for the tax in respect of it. That section did not disturb the right of the Crown to go against the recipient. The law was again altered by section 26 of the Finance Act, 1927. Rent was then for the first time made chargeable with tax by direct assessment on the payer. When the special commissioners were given power by section 170 to make an assessment on the payer, the power of the general commissioners to make an assessment on the payee was displaced. Section 170 creates the charge, and its assessment and payment must be in the way laid down in that section and in no other way. That section "requires" the special commissioners to assess the payer. They accordingly have an exclusive right and duty to assess. The additional commissioners cannot assess under section 36 because of the express limitation in the opening words of section 6.

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[3] [1910] 1 K.B. 725; 26 T.L.R. 351; 5 T.C. 537.

[4] [1953] Ch. 566, 573; [1953] 3 W.L.R. 170; [1953] 2 All E.R. 313; 34 T.C. 337.

It is agreed that this rent is chargeable under Case VI of Schedule D. If the additional commissioners make an assessment on the recipient under Case III the basis of the assessment will be the income of the preceding year and it will not be charged in the year in which it is received, as it would be if it were duly deducted in accordance with section 170. Section 148, which deals with the persons chargeable, does not govern this case. It has to be read with some qualification. It does not apply, for example, to foreign dividends. *Glamorgan Quarter Sessions* v. *Wilson*[5] and *Lord Advocate* v. *Edinburgh Corporation*[6] were decided under the law as it stood from 1888 to 1927.

After it was decided in *In re Lang Propeller Ltd.*[7] that the Crown had no priority in the liquidation of a mortgage company, which had deducted tax from the mortgage interest but had not accounted for it to the Crown, rule 21 of the All Schedules Rules of the Income Tax Act, 1918, was amended by section 26 of the Finance Act, 1927, and, as amended, is now section 170 (2) of the Act of 1918. In *Rye and Eyre* v. *Inland Revenue Commissioners*[8] it was held that the person "through whom" a payment of royalty was made was chargeable to income tax in respect of it. The observations of Upjohn J. in *Stokes* v. *Bennett (Inspector of Taxes)*[9] that an assessment of tax could validly be made upon the recipient of untaxed income were obiter. The appellants do not found their case on merit but on the proposition that the Crown is bound to recover the tax from the National Coal Board. The decision in *Morant Settlement* (*Trustees*) v. *Inland Revenue Commissioners*[10] is an example of the use of section 170. The nearest authority to this case is the *Edinburgh* case.[11] When section 170 applies, the special commissioners must assess the payer under that section, and the additional commissioners have no power under section 36 to assess the company.

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[5] [1910] 1 K.B. 725; 26 T.L.R. 351; 5 T.C. 537.

[6] (1905) 7 F. 972.

[7] [1927] 1 Ch. 120; 42 T.L.R. 702; 11 T.C. 46, C.A.

[8] [1935] A.C. 274; 51 T.L.R. 318; 19 T.C. 164, H.L.

[9] [1953] Ch. 566, 573; 34 T.C. 337; [1953] 2 All E.R. 313.

C. N. Beattie following. The decision in *Fry* v. *Salisbury House Estate Ltd.*[12] was concerned with the taxability of surplus rents. The issue here is not the same. The Crown here has no option to choose between the schedules. This is a Schedule D assessment. The schedules must be kept apart. Section 188 is similar to section 170; it would follow, if the Crown is right, that in relation to a foreign dividend, if the paying agent did not deduct tax, the Crown would tax the recipient of such dividend. A foreign dividend falls within Case V of Schedule D and, if the recipient were assessed, would be assessed in respect of the past year, while if it were paid by the paying agent, it would be assessed in the year of its receipt. If the paying agent deducted tax one year and did not do so the next, and the recipient were then taxed directly, he would be assessed to tax twice in respect of the same year. [Reference was made to section 180.]

It was never contemplated that the Crown should be able to assess the recipient under Case III. Take the case of a mortgagor liable to pay interest at a rate varying with the bank rate. If the mortgagor deducted tax one year and failed to do so the next, and the Crown then assessed the mortgagee he would have to pay tax twice on the same interest, and if the bank rate had dropped he would pay tax twice on the larger income. In such circumstances, it is not clear how the mortgagee's surtax return should be framed, having regard to section 524 (3). The procedure the Crown seeks to adopt is ancmalous and out of all reason.

Injustice lies not in preventing the Crown from collecting the tax from the recipient of the rent but in not allowing a payer, who has paid the duty, to recover it from subsequent payments.

F. N. Bucher Q.C. and *Alan Orr* for the Crown, the respondent. The Crown accepts that the general intention of the Act is to charge the payer, and the correctness of Viscount Simon L.C.'s observations in *Allchin* v. *Coulthard.*[13] The Crown must, however, keep available the right to go against the recipient. The payer may be abroad and the payee could sue for the full amount. In that case, the payer would not be in default in paying the full mortgage interest without deduction of tax, and it would be right to assess the payee.

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[10] [1948] 1 All E.R. 732; 30 T.C. 147, C.A.

[11] 7 F. 972.

[12] [1930] A.C. 432; 46 T.L.R. 336; 15 T.C. 266, H.L.

The Crown contests the proposition that a direct assessment is invalid. The first question is what is the charging section; the second, what is the income which is within section 170? Case VI applies, except where some other Case is applicable. Where the income is derived from land, prima facie, it is within Case III, and the basis of assessment would be the preceding year. Where the charge is under Case III or Case VI, prima facie, the payer is assessed. If the assessment on him breaks down, the primary liability of the payee remains. [Reference was made to *Whitworth Park Coal Co. Ltd.* (*in liquidation*) v. *Inland Revenue Commissioners.*[14]]

Subsection (3) of section 170 provides that the special commissioners " may " assess the payer. " May " there does not mean " shall." " May " means that the power is permissive. Parliament meant to keep the Crown's second right to assess intact. The decision in *Glamorgan Quarter Sessions* v. *Wilson*[15] shows that before the Act of 1927 the recipient of an annual payment could be assessed. Parliament, when it altered the law, did not intend to take that power away.

With regard to subsection (3) of section 170, it is submitted that the commissioners have a discretion to make an assessment on the payer, or to leave it to the general commissioners to make an assessment on the payee. It is implicit in the Act that two people cannot be taxed in respect of the same tax. If the tenant pays the tax, then the Crown cannot exact tax from the landlord.

Section 169 (1) is the counterpart of section 170. It has been in the Income Tax Acts since 1842, being section 122 of the Income Tax Act of that year. If the Crown is wrong, Parliament in 1927 must be taken impliedly to have reproduced in section 170 the express prohibition in section 169 (1) that no assessment shall be made on the person entitled to the annual payment. Section

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[13] [1943] A.C. 607, 618, 619; 59 T.L.R. 396; [1943] 2 All E.R. 352, H.L.; sub nom. *Allchin* v. *South Shields Corporation,* 25 T.C. 445, H.L.

[14] [1961] A.C. 31; [1959] 3 W.L.R. 842; [1959] 3 All E.R. 703; 38 T.C. 531, H.L.

[15] [1910] 1 K.B. 725.

170 laid down new assessment machinery. It did not alter the law. The right to charge the recipient is kept alive by subsection (4).

Primarily, matters falling within section 170 are not Case VI but Case III and, prima facie, Case III assessments are based on figures from the preceding year. If no deduction is made in any year and the recipient is assessed directly, there is no element of double taxation if the previous year's tax payment is used as the measure for the assessment. The applicability of section 170 depends on the tax status of the payer, and a payment may be within the section at one time and not at another. If the payment is not within the section, because it is payable out of profits which have been brought into charge, it would presumably be in section 169.

Canadian Eagle Oil Co. Ltd. v. *The King*[16] shows that *London County Council* v. *Attorney-General*[17] is still accepted. Lord Davey said there[18] that the Crown cannot demand tax twice over for the same income.

The fact that only one of the All Schedules Rules was amended in 1927 strengthens the point that it was not intended to alter the tax basis. Under the legislation of 1918 there was no doubt that the recipient could be taxed: *Glamorgan Quarter Sessions* v. *Wilson.*[19] In 1927 the draftsman deliberately eschewed prohibiting assessment on the recipient, when he came to rule 21 (now section 170), because there are cases, for example, where Crown immunity is involved or the payer is a foreigner, where the Crown must keep its power to assess the recipient.

To summarise the position: before 1927 the payee of sums within the provision corresponding to section 169 was by statute expressly excepted from direct assessment, and before 1927 the payee of sums within the provision corresponding to section 170 (1) was admittedly liable to direct assessment under section 148. New assessment machinery was introduced by the Finance Act, 1927, s. 26, to aid the Crown. That new machinery provided for assessment by the special commissioners on the payer on account of the payee's liability. It did not in terms deal with the assessment of the payee, nor did it in terms prohibit it. It was silent on that point. The direct assessment of the payee is not a matter directed by any Act to be executed by the special commissioners and, therefore, it is not withdrawn from the additional commissioners by section 3. The assessment of the payee is not by any Act required to be made by the special commissioners except at the election of the taxpayer under section 38, and, in the absence of election, the additional commissioners are competent to make the assessment in the present case. After 1927 the scheme of the Act contemplates that, in general, the payer will be assessed under section 170 (2), but such assessment is made in respect of the payee's liability to tax and, therefore, the Crown cannot also assess the payer in respect of the same payment. Even if the special commissioners were in dereliction of their duty to assess the payer under section 170 (2), which is not admitted, that does not relieve the additional commissioners of their statutory duty to assess the payee.

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[16] [1946] A.C. 119; 61 T.L.R. 577; 27 T.C. 205; [1945] 2 All E.R. 499, H.L.

[17] [1901] A.C. 26; 17 T.L.R. 131; 4 T.C. 265.

[18] [1901] A.C. 26, 43.

[19] [1910] 1 K.B. 725; 26 T.L.R. 351; 5 T.C. 537.

Heyworth Talbot Q.C. in reply. Before 1927 the recipient would only have been assessed if the tax had not been deducted—as in the *Glamorgan* case.[20] The Crown attaches too much significance to the failure of the draftsman to include in section 170 the express prohibition to be found in section 169 against the assessment of the payee. In the popular sense, it might be said that the payment is the payee's income and the tax on it is accounted for by the payer, but the liability is on the payer qua payer. If either pays, that should discharge the other, but, if the Crown is right, there could be two assessments, neither of which could be said to be invalid in law. Before 1927 the payee could be directly assessed, but the difference is that there is a statutory scheme under which income previously not subject to charge now is so subject. Following the *Lang Propeller* case,[21] the legislature have given the Crown the right, as against the payer, to an "assessed" tax. One cannot avoid all anomalies.

The vital question is whether an assessment under section 170 is within section 36. It is clear that the subject-matter of charge under section 170 is "profits and gains under Schedule D." Section 36 provides that, unless the assessment is "required" to be made by the special commissioners, it is to be made by the additional commissioners. These are profits or gains of the recipient which are "required" to be so assessed. It is not suggested that the Crown deliberately has attempted to take tax twice, but the question is whether their submission involves that the same subject-matter will be subject to a double charge. If so, that is the strongest ground for saying that is not right. [Reference was made to *Hughes* v. *Bank of New Zealand*.[22]]

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[20] [1910] 1 K.B. 725.

[21] [1927] 1 Ch. 120.

Section 170 (3) deals with the case where no satisfactory account has been delivered. It is natural to suppose that the legislature wished to give the special commissioners a discretion. For subsection (2) to operate it is not necessary that the tax should have been deducted. It is only necessary that an annual payment should have been made not out of profits and gains brought into charge. Where such a payment is made and tax is not deducted, then the account under subsection (2) will show " Nil " tax and that is a correct account for the purpose of the subsection. The special commissioners are " required " to assess " that payment." It is not without significance that the obligation is to assess or charge that " payment," not the tax deducted from it. The special commissioners have all the material that they require for making the assessment. In certain cases the recipient can be assessed, but only when the payment does not fall within section 170.

The special commissioners also have exclusive functions under sections 180 and 188. The only case where assessment can be made by one of the other commissioners is under section 180 (2) (*b*). An express provision was there necessary to counteract the effect of section 36 (2). If the Crown were right, that would have been otiose. The circumstances in *Hatch* v. *Hatch*[23] were different from the present. There is no need to overrule the *Glamorgan Quarter Sessions* case,[24] for it was pre-1927 and the circumstances were wholly different. The special commissioners were not then in the picture. They were first given the function of making an assessment in 1927 to meet the difficulty that the debt of the payer had been held not to be an assessed tax.

Cur. adv. vult.

December 20. The following judgments were read.

LORD EVERSHED M.R. In this case I have had the advantage of reading in advance the judgment to be delivered by Donovan L.J. I agree with my brother's conclusions and with his reasons for them. Out of respect, however, for the opposite conclusion which Harman L.J. has reached, and for the argument of the counsel for the appellants, I state shortly my own reasons for thinking that this appeal should be dismissed.

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[22] [1938] A.C. 366; 54 T.L.R. 542; 21 T.C. 472; [1938] 1 All E.R. 778, H.L.

[23] [1951] W.N. 235; [1951] 1 T.L.R. 825, D.C.

[24] [1910] 1 K.B. 725.

The case is, indeed, a remarkable one. The appellants granted to the National Coal Board a long lease (as that phrase is defined by section 172 of the Income Tax Act, 1952) of premises known as Hobart House, the lease being for a term of 81 years from March 25, 1955, at an annual rent of £96,177. The National Coal Board proceeded to pay to the appellants, in respect of each of the first six quarters under their lease, the rent in full, i.e., sums on each occasion of £24,044 5s., without any deduction in respect of income tax. Why the Coal Board omitted to make the deductions which it was their duty under section 170 of the Act to make, is not explained and is irrelevant for present purposes. The appellants appear to have accepted these quarterly payments—perhaps naturally enough—without demur. The Additional Commissioners for Income Tax have now proceeded to assess the appellants in respect of these quarterly sums of rent, as being profits or gains liable to tax under Schedule D of the income tax legislation. That they are such profits and gains was not disputed by Mr. Heyworth Talbot, but it is contended by him that the inevitable effect of the statutory language, in the relevant sections of the Act, is such that the appellants cannot now be assessed for income tax in respect of them. Mr. Heyworth Talbot also submitted, in opening his case, that the Coal Board remained liable to assessment in respect of their various payments, that it was indeed the duty of the special commissioners so to assess the board, but that the board could not now claim to deduct from any future payment of rent any tax which they would be made liable to pay upon such assessments. I am glad to say that, for the purposes of this appeal, it is unnecessary for the court to express any view upon any part of this submission.

That the sums of rent in question are profits and gains in the hands of the appellants is not in doubt: and Mr. Heyworth Talbot also conceded that, if the appellants were surtax payers, they would have to pay such tax in respect of the total sums so received by them. It was, however, the main burden of Mr. Heyworth Talbot's argument that the effect of the amendment made in 1927 to what is now section 170 of the Income Tax Act, 1952 (formerly rule 21 of the All Schedules Rules) has been inevitably to liberate persons in the position of the appellants from any liability to assessment for income tax in such circumstances as have occurred in the present case. In the end of all, the question

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turns, as I think, upon the short and single question: are the words of subsection (1) of section 36 of the present Act—" State-"ments of profits or gains under Schedule D shall, unless an "assessment thereon is required to be made by the Special Com-"missioners, be laid before the Additional Commissioners "—such as to produce the effect, when read in conjunction with section 170 of the Act, that the only assessment which may now lawfully be made in respect of rent payable under a long lease is an assessment to be made by the special commissioners upon the lessee, and so to disable the additional commissioners from themselves making any assessment in any circumstances upon the recipient? A similar point arises from the effect of section 170 upon section 6 of the Act; but the main argument has revolved round section 36, and I do not desire to add anything to what Donovan L.J. says in his judgment in regard to section 6.

If such is the effect of section 170, it was not suggested by Mr. Heyworth Talbot that the result was other than an oblique effect of an amendment to the law intended only to relate to the mechanics of income tax collection. Donovan L.J. has, in his judgment, traced the history of the relevant sections. Prior to the year 1888 liability for assessment to income tax in respect of annual payments made otherwise than out of the profits or gains of the payer rested exclusively upon the recipient as being part of his profits or gains subject to the general charge for income tax. In the year 1888, what later became rule 21 of the All Schedules Rules, was introduced in terms which corresponded to the first part of the first subsection of the present section 170. In the year 1927 it emerged, as a result of *In re Lang Propeller Ltd.*,[1] that the debt to the Crown thereby created, not being an assessed tax, gave to the Crown no priority in a winding up of the debtor. As a result rule 21 was, by the Finance Act, 1927, amended, and has since been in the form now represented by section 170. It will be observed that Parliament, in making this amendment, though it had before them the language of rule 19 of the All Schedules Rules (now section 169 of the Act of 1952) did not think fit to introduce into the amended rule 21 the language of the subsection 1 (*a*) of section 169: " No assessment "shall be made on the person entitled to the interest, annuity or "annual payment." It has been consistently held by the courts that the amendments introduced by the Acts of 1888 and 1927 were intended as changes only in the machinery of collection—see, for example, the judgment of Finlay J. in the case of *Rye and Eyre* v. *Inland Revenue Commissioners*,[2] and the observations of Upjohn J. in *Stokes* v. *Bennett (Inspector of Taxes)*.[3] It is also not in doubt, as a result of the case of *Glamorgan Quarter Sessions* v. *Wilson*,[4] that under the law as it then stood (in 1910) failure on the part of a lessee to make the deduction in respect of tax required by the terms of rule 21 (now found in section 170 (1)) did not have the effect that the lessor was not himself liable to be assessed in respect of the gross sum of rent which he had received. It is, however, now contended—and I return to the fundamental question in the case to which I have already adverted—that the references to assessment by the special commissioners introduced into what are now the later subsections of section 170 have, when read in conjunction with the terms of section 36 of the present Act, not only altered the machinery of tax collection by getting rid of the difficulty encountered in the *Lang Propeller* case,[5] but have materially altered the policy and substance of the law itself by making no longer possible, in circumstances such as the present, assessment of the lessor in respect of rents received by him without deduction by the lessee.

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[1] [1927] 1 Ch. 120; 42 T.L.R. 702; 11 T.C. 46, C.A.

If the purpose of the amendments to the statute was to alter only the machinery for collection, then I apprehend that the court should not give to such amendment the much wider effect now contended for, unless such conclusion is inevitable according to the strict construction of the material language of the statute. As Lord Dunedin observed in *Whitney* v. *Inland Revenue Commissioners*[6]: "A statute is designed to be workable, and the "interpretation thereof . . . should be to secure that object, unless "crucial omission or clear direction makes that end unattainable."

The general scheme or policy of income tax may be discerned, so far as relevant to this appeal, from sections 1, 122 and 148 of the Act of 1952. By the first of those sections tax is charged in respect of "all property profits or gains" described in section 122 (that is, Schedule D), including (by paragraph 1 (*a*) (i)) "the "annual profits or gains arising or accruing—(i) to any person resid-"ing in the United Kingdom from any kind of property what-"ever. . . ." By section 148 the tax under Schedule D "shall

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[2] [1935] A.C. 274; 51 T.L.R. 318; 19 T.C. 164, H.L.

[3] [1953] Ch. 566; 34 T.C. 337; [1953] 2 All E.R. 313.

[4] [1910] 1 K.B. 725; 26 T.L.R. 351; 5 T.C. 537.

[5] [1927] 1 Ch. 120, C.A.

[6] [1926] A.C. 37, 52; 42 T.L.R. 58; 10 T.C. 88, H.L.

"be charged on and paid by the persons receiving or entitled to "the income in respect of which tax under" the schedule is directed to be charged. Rents under long leases are brought within the scope of Schedule D by section 177 of the Act. To such rents, if paid by a lessee wholly out of profits or gains brought by him into tax, section 169 of the Act (formerly rule 19 of the All Schedules Rules) is applicable. Where, however, and to the extent that such rents are not payable out of profits or gains brought into charge, subsection (1) of section 170 requires the lessee, on making the payment, to deduct out of it a sum representing the amount of the tax thereon at the standard rate in force at the time of the payment. Subsections (2) and (3) of the section, so far as relevant, provide: "Where any such payment as aforesaid is made by or through any person, that person "shall forthwith deliver to the Commissioners of Inland Revenue, "for the use of the Special Commissioners, an account of the "payment, . . . and of the tax deducted out of the payment . . . "and the Special Commissioners shall assess and charge the "payment for which an account is so delivered on that person. "(3) The Special Commissioners may, where any person has "made default in delivering an account required by this section, ". . . make an assessment according to the best of their "judgment . . ."

Section 36 of the Act—the vital section for the purposes of this appeal—occurs in Chapter II of Part II of the Act, a chapter concerned, according to its heading, with "Returns and Assess- "ments." I, therefore, agree with Donovan L.J. that, according to the scheme and policy of the Act, a person in receipt of profits or gains of the nature of the rent here in question would, prima facie, be taxable in respect thereof and bound, accordingly, to make a return relating thereto. But the machinery of Part VII of the Act (and of sections 170 and 177 in particular) provides that in the case of a rent paid otherwise than out of the profits or gains of the lessee, the duty of the lessee is to deduct the appropriate tax out of his "payment" of the rent and to render an account accordingly for the use of the special commissioners, who will assess him in respect of such "payment" of rent. Thus the ordinary liability of the recipient of the rent (as his profits or gains) is discharged on his behalf by the lessee, so that the lessor is regarded for income tax (though not for surtax) purposes as having accounted for tax in respect of the rent.

We are only in this appeal concerned with the case where the lessee has paid the contractual rent in full, without making any deduction or rendering any account, as he should have done according to the terms of subsection (1) of section 170. What the position might be (or, indeed, might have been prior to 1927) where a lessee, having made the deduction, then failed to account therefor to the Commissioners of Inland Revenue (whether or not after assessment by the special commissioners under the existing Act) it is unnecessary for us to decide. I observe only that, since the rent in the cases supposed are profits or gains of the lessor and of no other person, any attempt to assess both the lessor and the lessee in respect thereof would appear at least to be open to the objection that an attempt was being made to tax the same person twice in respect of the same taxable income.

These problems do not, however, arise in the present case. The question on the facts of the present case remains; the lessor having received "profits or gains from . . . property" is he, according to the general scheme and policy of the Act, liable to make a return in respect thereof? Or is he exempted from so doing by the language of subsection (1) of section 36? I agree with Donovan L.J. that, upon the facts of the present case, the exemption of that subsection is inapplicable. According to its strict language and in the context of Chapter II of Part II of the Act, the subsection is related to profits or gains under Schedule D, and the exemption is similarly limited to cases where assessment of such profits or gains is "required" to be made by the special commissioners—for example, upon the request, as provided by section 38, of the person chargeable. As a matter of strict language, section 170 is concerned with the assessment of the "payment" of rent by the lessee. True, the "payment" is, by the section, identified with what would in the lessor's hands be profits or gains. Still, in the hands of the lessee, the subject-matter charged is the rent payment, which in his hands is not profits or gains, nor is it paid out of profits or gains for which he is chargeable. I refer again to the divergence in language in this respect between sections 169 and 170, the former of which (but not the latter) states expressly that no assessment shall be made upon the recipient of the payment.

But if this be too narrow a view, it is still, as I conceive, necessary to construe the word "required" in subsection (1) of section 36. True it is that, where the lessee has made the deduction when paying his rent and has accounted accordingly to the commissioners, then by the terms of subsection (2) of section 170 the special commissioners "shall" assess him. In such case, I will now assume that the assessment upon the lessee is "required" to be made by the special commissioners within the terms of section 36 (1) of the Act. But in the present case no deduction was made and no account delivered by the National Coal Board. It is therefore conceded by Mr. Heyworth Talbot that subsection (3) and not subsection (2) of section 170 is applicable, and the relevant words of subsection (3) are "The Special "Commissioners may . . . make an assessment." Though Mr. Heyworth Talbot was at first disposed to contend that "may" meant "shall," he later conceded that the powers of assessment conferred by subsection (3) are discretionary and not obligatory. If this is right, then can it fairly be said that, in the circumstances of the present case, the special commissioners are "required" to make an assessment within the terms of subsection (1) of section 36 of the Act? In my judgment it cannot. In my judgment, if it is contended that the amendment of the machinery provisions of what is now section 170 have the oblique but wide effect upon the general scheme of the Act so as, in a case such as the present, to absolve the lessor from his previously-existing tax liability, such result must be justified by a strict construction of the Act, that is of section 36 (1); and, in my judgment, the word "required" is not satisfied by a mere discretion.

It was said by Mr. Heyworth Talbot that this view had been dismissed as "preposterous" by Lord Dunedin, when Lord President of the Court of Session in the Scottish case of *Lord Advocate* v. *Edinburgh Corporation*[7] in the year 1905. That case was, however, decided long before the amendment introduced by the Act of 1927, and the argument characterised as "preposterous" was different from that which has appealed to me. The Corporation of Edinburgh, having failed to deduct tax from certain interest payments on money borrowed by the corporation (as it should have done under the Act of 1888), was nonetheless assessed to tax upon the interest payments. It was contended by the corporation that since it had, in breach of its statutory duty, failed to deduct the tax, therefore no debt was due to the Crown; that, accordingly, the only remedy of the Crown was for damages at common law; and that the Crown had failed to prove any such damage, since (as was then admittedly the law) it could assess

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[7] (1905) 7 F. 972.

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and recover the tax from the recipient of the interest. It was this contention which Lord Dunedin described as " preposterous." In my judgment, the case provides no authority for the view that the epithet is applicable to the construction which I would give to the word " required " in what is now section 36 (1) of the Income Tax Act, 1952.

For these reasons, as for the reasons stated by Donovan L.J., I think this appeal fails and should be dismissed.

HARMAN L.J. Under rule 21 of the All Schedules Rules of the Income Tax Act, 1918, and, indeed, as far back as 1888, it was provided that on payment of such a sum as the rent here in question, if not paid out of profits or gains already brought into charge to tax, the payer must deduct a sum equal to the tax in force at the time of payment. By rule 21 (2) ibid., the payer must account for this sum to the Commissioners of Inland Revenue, and the sum became a debt due from him to the Crown and recoverable accordingly.

This continued to be the law until the year 1926, when the point emerged that in a case where bankruptcy principles applied (*Lang's* case [8]) the Crown had no priority for what was merely a debt having regard to rule 21 (2), and not an assessed tax, priority being confined to the latter.

Accordingly, by section 26 of the Finance Act, 1927, the law was altered and rule 21 (2) was replaced by the provision which is now section 170 (2) of the statute of 1952. The new subsection obliges the payer to deliver his account to the Commissioners of Inland Revenue " for the use of the Special Commissioners," who are directed to assess and charge " the payment of which an " account is so delivered." Subsection (3) authorises, but does not require, the special commissioners to make an assessment on the payer, who has made default in delivering an account under the rule, and he is liable to forfeit £100.

Now it is conceded that, under the law as it stood till the alteration of 1927, the Crown could, having regard to Miscellaneous Rule 1 of Schedule D to the Act of 1918, charge the payee of the rent who had received it without deduction. The ordinary process would apply, that is to say, the additional commissioners would make the assessment under section 121 of the Act of 1918, now section 36 of the Act of 1952. This was so held in *Glamorgan Quarter Sessions* v. *Wilson*,[9] with which I see no cause to quarrel;

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[8] [1927] 1 Ch. 120.

[9] [1910] 1 K.B. 725; 5 T.C. 537, 544.

but the Act of 1927, which turned the retained sum from a debt due to the Crown into an assessed tax, also directed the assessment of it to be made by the special commissioners, and it is said here that the result is that these alone have the power to make an assessment under section 170 (2) as the law now stands, and therefore there is no power in the additional commissioners which enables them to assess the payee.

The grounds for this argument are section 6 and section 36 of the Act of 1952 which, so far as relevant, are in these terms: "6—(1) All matters relating to the income tax under Schedules ". . . D, so far as they are not directed by this Act to be executed "by any other Commissioners, . . . shall be executed, as heretofore, by the Commissioners for the general purposes of the "income tax (in this Act referred to as 'General Commis- "'sioners')." Section 36 (1): "Statements of profits or gains "under Schedule D shall, unless an assessment thereon is required "to be made by the Special Commissioners, be laid before the "Additional Commissioners" who "shall direct an assessment "to be made in accordance with the statement."

Now by reason of the alteration of the law in 1927, it is said that the latter section does not apply by reason of the exception, and, if these payments can properly be said to be "profits or "gains," I can see no answer to this argument that the assessing power of the general commissioners is now excluded. It is objected that the exception only applies to "profits or gains," and that these deductions from rents are not the lessee's profits or gains, but are payments, and it is pointed out that in section 170 they are so called, and that it is payments and not profits or gains which the special commissioners are there directed to assess and charge. This portion of the rents, however, if not deducted (as here), but paid over to the lessor, is undoubtedly a profit or gain in his hands and must be included under those words in order to be taxable subject-matter under Schedule D: for it is under that schedule alone that it can be taxed. It seems to me, therefore, that the exception in section 36 does extend to these payments, even though they are there looked at from the payee's end and, therefore, so styled.

If this be right, the position is confused by the fact that section 148 of the Act of 1952 provides that tax under Schedule D shall be charged on and paid by the recipient. These moneys are, as I have said, part of his profits or gains. Section 177, however, which is the charging section for rents under long leases, provides by subsection (2) that any payment under that section shall be subject to deduction of tax under Chapter I of this Part, a reference back to section 170, which enjoins the payer and not the recipient to account for the tax, thus being an exception to the generality of section 148.

If I am right so far, it would look as though the Crown, like the dog in the fable, in reaching for the reflected bone in the water—that is for a tax assessed on the lessee and having priority in bankruptcy—has dropped the bone in its mouth represented by the power to assess the lessor. No doubt this is a casus omissus which can be remedied in due course.

It is, in my judgment, an additional argument against the Crown's view that it may result in two assessments, one on lessee and the other on lessor, which are both equally valid in law and both in respect of the same sum of money, first in the hands of the payer and second in those of the payee. This is contrary to the general principle that tax on one sum is not to be charged twice.

I am conscious that there are very formidable arguments on the other side. As I have said, it seems unlikely that Parliament by granting to the Crown in 1927 the additional advantage, which the decision of 1926 showed it to require, intended by the same section to deprive it of a right which went back to the origins of the income tax law, and which had been until 1888 the only means of collecting the tax on rents not paid out of profits or gains already charged, but this is, in my judgment, to impute too exalted a standard of consistency to the legislative patchwork embodied in the 532 sections, not to mention fourteen schedules, of the Act of 1952. Any judge with experience of income tax cases, either in this court or below, cannot fail to be conscious of the fact that there are many holes in the net, to which the work of patching is still yearly applied. The whole subject cries out for a drastic overhaul which is often promised but never so far achieved. Until the advent of that hoped-for day, I think the court should only follow the language which it finds set down. Pedetemptim, as Lucretius would say, progredientes. It seems to me dangerous to talk of "the policy of the Act" or the "equity of the "statute." I speak here under the great aegis of Rowlatt J., and see the observation of Lord Halsbury L.C. in *Tennant* v. *Smith*.[10] The court should construe the sections as it finds them, and if unexpected results emerge, the cure of them is for Parliament and not for us.

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[10] [1892] A.C. 150, 154; 8 T.L.R. 434; 3 T.C. 158, H.L.

Another objection is that by section 170 (3) of the Act the special commissioners in cases where, as here, default has been made, are not required but merely empowered to assess. My answer to that is that nonetheless tax under section 177 is one required (by section 170 (2)) to be assessed by the special commissioners, and so answers to the exception found in section 36.

The strongest argument for the Crown, as it seems to me, is that in section 169, which deals with deductions where the lessee has paid his rent out of taxed income, there is an express prohibition against assessing the lessor. No such provision is to be found in section 170, and it is, therefore, argued that the formerly existing power to tax him is not taken away. The answer seems to me to be that neither rules 19 and 21 of 1918 nor their predecessors were concerned with assessment of these sums. In one case the lessee was only recouping himself tax already paid: in the other he was till 1927 left with a debt to the Crown. When the latter was converted into an assessed tax, it was not perceived that the result might be that section 36 would be involved.

Danckwerts J. was obviously impressed by the taxpayer's argument and would apparently have accepted it but for the dicta of Finlay J. and Upjohn J. which he mentions. For myself I do not feel bound to accede to them, neither being necessary to the decision the judge was pronouncing.

DONOVAN L.J. This appeal raises afresh the question whether an assessment to income tax may validly be made upon the recipient of income in a case where the payer of the income should have deducted tax at source and accounted for it to the Revenue, but has failed to make any such deduction. The problem can be stated in that general way, because it affects all annual payments charged to tax under Schedule D, although the particular payment here involved is rent.

The National Coal Board is tenant of Hobart House in Westminster at a rent of some £96,000 per annum. Between June, 1955, and September, 1956, it made six quarterly payments of rent—about £24,000 each time—to the appellants, who are the landlords. This rent is rent under a long lease as defined in section 172 of the Income Tax Act, 1952. The facts are such that the National Coal Board should have deducted tax at source from these payments and handed the tax in due course over to the Revenue. For some reason the Coal Board failed to make any such deductions, and so assessments have been made upon the appellants direct as recipients of the income. The rent in question is charged to tax under Schedule D by section 177 of the Income Tax Act, 1952, and normally under Case VI of that Schedule. Section 177 (2) also enacts that such rent shall be subject to deduction of tax as if it were a royalty or a sum paid for the user of a patent. This means that the machinery of collection of tax at source, which is provided by sections 169 and 170 of the Act, becomes applicable. Under section 169, if the taxpayer has a fund of taxed profits out of which he pays the rent, he must pay tax himself on the whole fund without any deduction for the rent, though the rent is not really his income. When he comes to pay the rent, he may recoup himself by deducting tax at the current standard rate and retain it, and the landlord must allow the deduction. In this class of case, an assessment on the recipient in respect of the rent is expressly forbidden by the section. On the other hand, where, as in the present case, the rent is not paid out of a taxed fund, the Revenue clearly cannot get its tax on the rent in the manner just prescribed. Section 170, therefore, provides that in such a case the payer of the income *must* deduct tax at source at the standard rate and send an account of the payment and of the tax deducted to the Commissioners of Inland Revenue for the use of the special commissioners. The special commissioners are then to make an assessment in respect of the payment upon the payer: and, upon such assessment, he will be liable to pay over to the Revenue the tax so deducted. If the payer makes default in rendering such an account, or the special commissioners are not satisfied with the account he has delivered, then they may make an assessment upon him to the best of their judgment. They can also inflict a penalty if he neglects or refuses to deliver the account, which, up to 1960, was the sum of £100. In this class of case there is no express prohibition of an assessment direct upon the recipient of the income.

The history of section 169 goes back to 1803, when it appeared in the Income Tax Act of that year as section 208. In the Act of 1842 it was section 102. In the Consolidation Act of 1918 it became rule 19 of the General Rules applicable to All Schedules. Its wording has remained unchanged, in any radical sense, down to the present day. The history of section 170 begins, however, in 1888. Up to that time, the only way provided for getting tax on annual payments made out of untaxed funds was an assessment direct upon the recipient. But section 24 (3) of the

Customs and Inland Revenue Act of 1888 introduced the system of collecting the tax at source in this case also. The payer was to deduct tax and to render an account to the Commissioners of Inland Revenue of the amount deducted. That sum was then to be a debt due from him to the Crown and recoverable as such. There was no provision for any *assessment* upon him.

In the Consolidating Act of 1918 section 24 (3) became rule 21 of the General Rules applicable to All Schedules. Its wording remained substantially unchanged until 1927. In that year this court decided the case of *In re Lang Propeller Ltd.*[11] That company was being wound up, but before the winding up began it had deducted tax under general rule 21 from mortgage interest but failed to hand it over to the Crown. The Crown proved in the liquidation as a creditor. Under the Companies Consolidation Act, 1908, then in force (section 209), the Crown was entitled to preferential payment in respect of assessed taxes. It claimed that this description applied to the tax which the company had deducted under general rule 21. This court, affirming Eve J., held that it did not, and that such tax could not be described as "an assessed tax." So the Crown got no preference for the debt. It then proceeded—if I may borrow the euphemism customary on these occasions—to "put the matter right." In the Finance Act, of the same year, section 26 was enacted requiring the payer of the income to render an account of the payment made out of untaxed funds, and of the tax deducted, and requiring the special commissioners to make an assessment upon him accordingly. In short, the system was introduced which exists today, and which has been reproduced without material alteration as section 170 in the Consolidating Act of 1952. In that way the tax deducted in such circumstances became an "assessed tax," and so the Revenue acquired that preference in respect of it in a winding up which it had unsuccessfully sought in the *Lang Propeller Ltd.* case.[12]

It is, I think, important to bear in mind the reason for the amendment of general rule 21, inasmuch as the taxpayer is contending in the present case that it has had another and more far-reaching result. It is said on his behalf that the amendment also deprived the general commissioners of the power, which they admittedly had from 1803, to assess the recipient of the income directly in such cases. It had been decided long before 1927 that an assessment could validly be made upon the recipient of an annual payment made out of untaxed funds where no tax had been deducted at source. See *Glamorgan Quarter Sessions* v. *Wilson*,[13] which was decided in 1910. It has also been held that where the payer of the income omits to deduct the tax at source, he is still liable to account to the Crown for it. See *Lord Advocate* v. *Edinburgh Corporation*,[14] decided in 1905; *Rye & Eyre* v. *Inland Revenue Commissioners*,[15] decided by the House of Lords in 1935. And in these cases it was for one reason or another pointed out that general rules 19 and 21 were simply machinery for collecting tax. Finlay J. (as he then was) also said in the *Rye & Eyre* case,[15] that the change in rule 21 in 1927 was a change in the machinery of collection and no more. In 1953 Upjohn J. (as he then was) expressed the view in *Stokes* v. *Bennett* (*Inspector of Taxes*)[16] that an assessment of tax could validly be made upon the recipient of untaxed income in a case where general rule 21 should have been operated but was not. But this expression of opinion was obiter.

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[11] [1927] 1 Ch. 120.

[12] Ibid.

In the present case both the special commissioners and Danckwerts J. have rejected the appellants' argument that since 1927 no assessment to tax in what I may call a general rule 21 case can be made upon the recipient of the income. After considering the authorities, the judge thought he should follow the decision in *Glamorgan Quarter Sessions* v. *Wilson*[17] and adopt the dictum of Upjohn J. in *Stokes* v. *Bennett*.[18]

The alteration in the law made in 1927, converting tax deducted under rule 21 into tax assessable by the special commissioners upon the payer, could hardly, of itself, deprive the general commissioners of a different jurisdiction which they admittedly had before that date to make an assessment upon the payee. But it is argued that this result is brought about by the language of section 26 of the Act of 1927—now reproduced without material change in section 170 of the Act of 1952—when construed together with sections 6 and 36 of the Act of 1952, and also in the light of the general scheme of that Act. It is also contended that a number of anomalies, which would otherwise arise, are avoided by the appellants' construction. As to section 170 itself, the mandatory nature of the direction to the special commissioners is emphasised: "The Special Commissioners shall assess "and charge the payment." Then in section 6 of that Act appear these words: "All matters relating to the income tax "under Schedules A, B and D, so far as they are not directed by "this Act to be executed by any other Commissioners . . . shall "be executed, as heretofore, by the Commissioners for the general "purposes of the income tax. . . ." The assessment of the rent in the present case is a matter under Schedule D: and it is said that the effect of section 6 is to confine the jurisdiction to assess in cases like the present to the special commissioners. The words relied upon in section 36 are these: "Statements of profits or "gains under Schedule D shall, unless an assessment thereon is "required to be made by the Special Commissioners, be laid "before the Additional Commissioners." This again indicates, it is argued, that the special commissioners have exclusive jurisdiction to assess to tax the payments here in question: and that this conclusion is reinforced by what is said to be the general scheme of the Act to allot the duty of assessment of different kinds of income to different bodies of commissioners with no overlapping.

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[13] [1910] 1 K.B. 725; 26 T.L.R. 351; 5 T.C. 537.

[14] 7 F. 972.

[15] [1935] A.C. 274; 51 T.L.R. 318; 19 T.C. 164, H.L.; [1934] 2 K.B. 270.

[16] [1953] Ch. 566, 573; 34 T.C. 337; [1953] 2 All E.R. 313.

[17] [1910] 1 K.B. 725; 5 T.C. 537.

[18] [1953] Ch. 566, 573.

The payments which are assessed to tax under section 170 do, of course, become income in the hands of the recipient—which is why they are taxed. But in the context of the present problem it is, I think, both relevant and important to remember that what the special commissioners are in terms told to do in section 170 is to "assess and charge the payment," and to do so on the payer. With this in mind, and turning back to section 6, it is strictly true to say that an assessment upon the recipient in respect of his receipt would not offend against the section, for such an assessment is not directed to be executed by commissioners other than the general commissioners.

In view of the stress laid upon section 36, I must deal with it in some greater detail. It is not a section which can properly be construed in isolation. It is one of a number of sections in Chapter II of the Act headed "Returns and Assessment," and in this chapter are found the provisions imposing an obligation on the taxpayer, who is in receipt of profits or gains, to make an income tax return, and a duty upon the general commissioners to make an assessment of those profits and gains to income tax. Thus, any person chargeable to income tax for any year of assessment is to give notice to that effect to the surveyor (section 28).

If required to do so by notice, an individual must make a return of his total income for the preceding year (section 19): and also a return of the profits and gains arising to him for the current year estimated according to the provisions of the Act (section 20). The form of the return is to be such as the Commissioners of Inland Revenue shall prescribe, and in prescribing such forms those commissioners are to have regard to the desirability of limiting such returns to one per annum. In addition each such return is to contain a declaration by the person making it that it is truthful and comprehensive of all his profits and gains (section 25). A penalty is imposed for neglect or refusal to make such a return, which penalty, up to 1960, was £20 and treble tax (section 25). The returns of profits under Schedule D are to be laid before the additional commissioners, they are to consider them, and if satisfied with them, are to direct an assessment to be made in accordance with the statement. This is subject to the exception, so much relied on by the appellants here, " unless an " assessment thereon is required to be made by the Special " Commissioners " (section 36). Finally, a person chargeable under Schedule D may require that all the proceedings in order to have an assessment upon him under that schedule shall be taken before the special commissioners instead of before the additional commissioners (section 38).

It is, I think, quite clear that these sections, including section 36, are dealing with the annual statement of profits and gains accruing to a taxpayer and with the assessment to be made upon him in respect thereof. They are not dealing with the " accounts " of payments required from the payer of money under section 170, which " accounts " have to be made on each occasion of such a payment; for which " account " no form is prescribed and for default in rendering which a different penalty can be imposed. Nor are the sections in Chapter II dealing with assessments upon such a payer, but with assessments upon the person who has made a return of his profits and gains. It is, therefore, in my respectful opinion, fallacious to construe the words in section 36 " unless an assessment thereon is required to " be made by the Special Commissioners " as including a reference to the payments assessed to tax upon the payer under section 170. Those words refer to the various cases where the Act directs an assessment on profits or gains by the Special Commissioners, e.g., where a taxpayer makes an election to this effect under section 38, and (under section 430) to the income of foreign assurance companies with a head office in the United Kingdom in respect of the income of their life insurance funds, and so on.

With regard to anomalies, the example was given of mortgage interest from which tax had been deducted for some years and accounted for under section 170 until in one year no such tax was deducted. If the general commissioners then made an assessment direct upon the recipient, they would under Case III of Schedule D have to base the assessment on the income of the preceding year, and if that were less than the income of the current year, a different figure of income and a different amount of tax would be the result of such an assessment compared with the result of operating section 170. This indeed would be true, but such anomalies are not uncommon where, for one reason or another, the preceding year basis of computation is substituted for the actual year basis, or vice versa. I do not find the anomaly or the others which were suggested to be so startling as to compel the conclusion that the appellants' contentions here must be right.

I should briefly mention section 180 of the Act of 1952 which was said to support the argument. The section deals with the taxation of rents in respect of land not separately assessed and charged under Schedule A and in respect of easements: it enacts that these shall in certain cases be taxed under Schedule D and be subject to deduction of tax at source. Subsection (2) deals specifically with rents in respect of easements enjoyed in connection with electric wires and cables: and proviso (b) to the subsection enacts that any payment of such rent shall, unless tax is assessed thereon under section 170, be chargeable to tax under Case III of Schedule D. It is said that this direction would be otiose if the rent were always so chargeable under the general provisions of the Act. In my opinion this is incorrect. The rents to which proviso (b) is referring are not the kind of annual payment normally falling within the charging provisions of Case III of Schedule D. But the proviso specially makes these provisions applicable, and so specifies the head of charge under which such rents are, if need be, to be assessed. I do not think much can be spelled out of this circumstance either way: but it is interesting to observe that the very anomaly the court is asked to avoid by adopting the appellants' argument is here introduced by the legislature itself. For to charge these rents under Case III will import the preceding year basis of liability, as opposed to the actual year basis, which is always a feature of taxation at source under section 170.

The Crown's argument begins with the first section of the Act of 1952 which provides that whenever any Act enacts that income tax is to be charged for any year, it is to be so charged at the prescribed rates, and in accordance with the Schedules A, B, C, D and E. Section 6 of the same Act, part of which I have already read, then enacts that the general commissioners are to execute all matters relating to income tax under Schedules A, B and D, in so far as they are not directed by the Act to be executed by other commissioners. Section 122 of the Act provides that under Schedule D tax shall be charged, inter alia, in respect of profits and gains arising in the United Kingdom to any person from any kind of property here. And section 148 provides that tax under Schedule D shall be charged on and paid by the persons receiving or entitled to the income coming within that schedule. The rent in question in this case is charged to tax under Schedule D by virtue of section 177 (2) of the Act and the appellants are the persons receiving it. They must, therefore, if required, make a return of such income and the additional commissioners must then assess it to income tax under the provisions of the 1952 Act which I have already cited.

There would thus seem to be complete authority for the additional commissioners to make the assessments they have made upon the appellants. It is admitted that such authority existed before the Finance Act, 1927, back at least to 1842, in fact it goes back to 1803. The contention that this jurisdiction was taken away by the amendments to general rule 21 made in 1927 rests upon the arguments which I have already outlined. I can find nothing in them to justify the conclusion that the granting of a new jurisdiction to the special commissioners to collect tax at source in a particular way destroyed the jurisdiction of the general commissioners to collect it in some other way if need be. Had such a result been intended, then I think that an express prohibition against an assessment on the recipient would have been introduced into general rule 21 of the same kind as has always been contained in general rule 19 and its predecessors. There is sound reason for not doing this and for preserving the jurisdiction of the general commissioners. For there may be cases where for one reason or another an assessment on the payer cannot be made or made effectively. He may be elusive, or he may be a person not amenable to section 170, e.g., the Crown itself or a foreign ambassador or a resident High Commissioner.

The appellants agree that in such a case the payee would be directly assessable, as indeed Lord Simonds appears to indicate

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in *Whitworth Park Coal Co. Ltd. (in Liquidation)* v. *Inland Revenue Commissioners*.[19] In other words, it is conceded that where section 170 cannot be operated, because the payer is not amenable to its provisions, the power of the general commissioners to assess the payee still endures. This seems to me to increase the difficulties of the argument, for one would certainly expect a partial withdrawal of the general commissioners' jurisdiction to be by express enactment.

In my opinion, section 26 of the Finance Act, 1927, did not have the effect which the appellants here claim. The power and duty of the general commissioners to make assessments upon annual payments charged with tax under Schedule D where such payments are made out of profits and gains not brought into charge to tax, still remains. This does not involve liability to double taxation, once by deduction at source and again by assessment upon the same income. It is true that there is nothing in the Act expressly prohibiting such an injustice, but the prohibition is implicit in its provisions, as the courts have frequently said. See, for example, Lord Davey in *London County Council* v. *Attorney-General*.[20]

I think the special commissioners and the judge came to the right conclusion in this case and that this appeal fails.

Appeal dismissed with costs.
Leave to appeal to the House of Lords.

Solicitors: *Stanley Attenborough & Co.; Solicitor of Inland Revenue.*

B. A. B.

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[19] [1961] A.C. 31; [1959] 3 W.L.R. 842; [1959] 3 All E.R. 703.

[20] [1901] A.C. 26, 43; 17 T.L.R. 131; 4 T.C. 265, H.L.

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Oct. 26, 27, 28;
Nov. 3.

Danckwerts J.

WEG MOTORS LTD. *v.* HALES AND OTHERS.

[1959 W. No. 1533.]

Landlord and Tenant—Lease—Option to grant further lease—Lease for 21 years—Option to grant further lease in agreement under hand—Option exercisable more than 21 years from date of lease—Whether option to renew lease or to grant new lease—Whether valid—

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WEG MOTORS LTD. *v.* HALES.

Whether covenant having "reference to the subject-matter of the "lease"—Whether reversionary estate bound by option—Whether option running with reversion—Whether an overriding interest— Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 142, 149 (3), 154.

Practice — Parties — Company which has ceased to exist — Whether necessary party.

By a mortgage dated July 8, 1937, and registered in the charges register on July 10, 1937, the G. company, the legal owner of premises with a registered title, charged them by way of legal mortgage to the S. company, the deed providing that the statutory powers of leasing and accepting surrenders of leases should not, save in the case of leases for terms up to 21 years, be exercisable by the borrowers without the written consent of the lenders. By a lease dated July 26, 1938, the G. company granted a lease of the premises to the W. company for a term of 21 years from December 25, 1938, determinable by the lessee at the end of seven or 14 years at a rent of £1,500 per annum. By an agreement made between the same parties, that expression including their successors in title, and also dated July 26, 1938, but signed before the execution of the lease, it was agreed that in consideration of the W. company taking the lease of even date but "executed after these "presents" it should have the option, exercisable at any time before December 25, 1959, of taking a further lease for a term of 21 years at the same rent, if the lease had not already determined. The further lease was to commence from the date of the exercise of the option, when the G. company would accept surrender of the old lease. The option was registered on January 5, 1939.

On October 15, 1941, the H. company was registered as proprietor of the freehold and by a transfer dated February 11, 1947, and registered on February 21, 1947, it transferred the premises to the trustees of the R. company, subject to the option. By a lease dated February 11, 1947, and also registered on February 21, 1947, the trustees of the R. company demised the premises to the H. company for a term of 150 years at a yearly rent of £5,000 subject to the option. By a deed of substituted security of even date the H. company demised the premises to the S. company for a term of 150 years less 10 days subject to the right of redemption on payment of the principal and interest owing under the mortgage of July 8, 1937, and the S. company surrendered the freehold title to the trustees of the R. company, "the reversioners," to the intent that the mortgage term should cease and merge in the reversion, but subject to the lease of February 11, 1947. On February 21, 1947, the entry of the mortgage in the charges register was cancelled and the H. company was registered as proprietor of the leasehold.

By a notice dated April 30, 1959, the W. company gave notice to the H. company, the R. company and the S. company exercising the option contained in the agreement of July 26, 1938. The H. company refused to renew the lease, the R. company stated that it was not in a position to grant a renewal but that it was a matter for the H. company, and the S. company stated that its consent would not be required for the grant of any lease for a period of up to 21 years. The deed of substituted security was discharged on September 2, 1959. The G. company had ceased to exist at least 15 years previously.

In an action by the W. company against the trustees of the R. company, the H. company and the D. company (to whom the H. company had by a registered transfer dated July 10, 1959, transferred its leasehold interest), for specific performance of the agreement containing the option for the grant of a further lease:—

Held, (1) that as the G. company had ceased to exist the action was properly constituted without it (post, p. 190).

(2) That the agreement of July 26, 1938, was a covenant for the renewal of a lease and as such was exempt from the rule against perpetuities; and that as a matter of construction (or, if necessary, of implication) it was an option for the renewal of the lease exercisable only while the relationship of landlord and tenant continued, and not a provision for the granting of a new lease which might be implemented after an interval from the determination of the original term, and that, not being a contract to grant a reversionary lease, it was not rendered void by section 149 (3) [1] of the Law of Property Act, 1925 (post, pp. 190, 191, 192).

In re Strand and Savoy Properties Ltd. [1960] Ch. 582; [1960] 3 W.L.R. 1; [1960] 2 All E.R. 327 followed.

Dictum of MacKinnon L.J. in *Shirlaw* v. *Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206, 227, C.A. applied.

(3) That the option ran with the reversion under section 142 of the Law of Property Act, 1925,[1] for the lease of July 26, 1938, and the agreement of that date were one transaction, the agreement being an integral part of the transaction and not merely collateral and the word "covenant" in the law of landlord and tenant was not confined to its ordinary meaning of a contract under seal so that the section applied to contracts under hand; a covenant

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[1] Law of Property Act, 1925, s. 142 (1): "The obligation under a "condition or of a covenant entered "into by a lessor with reference to "the subject-matter of the lease shall, "if and as far as the lessor has power "to bind the reversionary estate "immediately expectant on the term "granted by the lease, be annexed "and incident to and shall go with "that reversionary estate, or the "several parts thereof, notwithstanding severance of that reversionary "estate, and may be taken advantage "of and enforced by the person in "whom the term is from time to "time vested by conveyance, devolution in law, or otherwise; and, if "and as far as the lessor has power "to bind the person from time to "time entitled to that reversionary "estate, the obligation aforesaid may "be taken advantage of and enforced "against any person so entitled."

S. 154: ". . . 'lease' includes an "under-lease or other tenancy."

S. 149 (3): "A term, at a rent or "granted in consideration of a fine, "limited . . . to take effect more "than 21 years from the date of the "instrument purporting to create it, "shall be void, and any contract . . . "to create such a term shall likewise "be void; but this subsection does "not apply to any term taking effect "in equity under a settlement, . . . "or under an equitable power for "mortgage, indemnity or other like "purposes."

for renewal of a lease had always been regarded as a covenant having reference to the subject-matter of the lease within the meaning of section 142, and on July 26, 1938, the only reversionary estate was that vested in the G. company as owners of the fee simple and that that company, therefore, had power to bind the reversionary estate immediately expectant on the term granted by the lease and the option. Accordingly, the W. company were entitled to specific performance of the option against the H. company and the D. company (post, pp. 193, 194, 195, 196).

Muller v. *Trafford* [1901] 1 Ch. 54; *Richardson* v. *Sydenham* (1703) 2 Vern. 447 followed.

Dictum of Farwell J. in *Hunt* v. *Luck* [1901] 1 Ch. 45, 49 applied.

(4) That the trustees of the R. company, as the present freeholders, were bound by the lease and the option, and the W. company were entitled to specific performance of the option against them (post, p. 197).

ACTION.

The following statement of facts is taken from the judgment of Danckwerts J. By a lease dated July 26, 1938, G.R. Investments Ltd., a company now no longer in existence (thereinafter called "the lessor," which expression was to include the reversioner for the time being immediately expectant on the term thereby created where the context so admitted), demised to the plaintiff company, Weg Motors Ltd. (thereinafter called "the lessee," which expression was to include its successors and assigns where the context so admitted), certain land in St. John's Wood, London, at the rear of a block of flats, Grove Hall Court, together with the garages and outbuildings erected thereon, for a term of 21 years from December 25, 1938, determinable by the lessee at the end of seven or 14 years, at a rent of £1,500 a year. By clause 3 (ix) the lessor covenanted that he would permit the lessee to make certain openings in party walls, "the lessee reinstating and "making good the same at the expiration of the term or any "renewal thereof. . . ."

By an agreement made on the same date, July 26, 1938, but signed, it appeared, immediately before the execution of the lease, and made between the same parties (with definitions also including their respective successors in title), it was agreed that in consideration of the plaintiff company taking a lease of even date but "executed after these presents" from the lessors, the lessees should have the option of taking a further lease of the premises demised by the lease for a term of 21 years at the yearly rent of £1,500. Clause 2 of that agreement provided that the option should be exercisable by notice in writing given by the lessees to the lessors at any time before December 25, 1959, and if and when the same should be exercised, the lessors should grant and the lessees should accept a further lease of the premises for the same term (such term to commence from the date of the exercise of the option) at the same rent, and the lessees should thereupon surrender the unexpired residue (if any) of the lease of July 26, 1938, to the lessors who should accept such surrender. Clause 3 provided that the lease should be in the form and to the effect of the lease of July 26, 1938.

At the date of that transaction or transactions, G.R. Investments Ltd. were the legal owners of the fee simple in the property, but on July 8, 1937, they had mortgaged the property to the Standard Life Assurance Company of Edinburgh. That mortgage was a charge by way of legal mortgage and consequently no actual demise or term of years was created, but it had the effect provided by section 87 of the Law of Property Act, 1925. Clause 15 of the mortgage provided that the statutory powers of leasing and accepting surrenders of leases should not be exercisable by the borrowers without the written consent of the lenders, but that clause was not to be deemed to apply to lettings by lease or agreement or otherwise for any period up to 21 years, and the acceptance of surrenders thereof, it being thereby agreed that such might be done by the borrowers without the consent of the lenders. Clause 18 provided that in every case in which, under the mortgage, anything was to be done to the satisfaction or done with the approval or consent of the lenders, or any direction or notice was to be given by or to the lenders, such satisfaction, approval or consent should be sufficiently evidenced by any writing under the hand of the secretary or general manager for the time being of the lenders, and every such direction or notice should be sufficiently and effectually given by or to such secretary or general manager.

The consent of the lenders was not obtained in respect of the lease of July 26, 1938, and was not required in respect of the term of 21 years thereby created.

G.R. Investments Ltd. had been registered under the Land Registration Act, 1925, as proprietors of the land with absolute title on September 14, 1934. On July 10, 1937, the mortgage of July 8, 1937 was registered in the charges register. On January 5, 1939, notice of the option was registered as an agreement, dated July 26, 1938, conferring on the plaintiff company an option to take a lease for a term of 21 years from the exercise of the option at the rent of £1,500 and on the condition therein contained. On January 11, 1939, there was registered a transfer of the land to United Investors Co-operative Society Ltd. (which afterwards changed its name to Unicos Property Corporation Ltd.). On October 15, 1941, Grove Hall Court Ltd., the fourth defendants, were registered as the proprietors of the land. On February 21, 1947, the trustees of the Royal Liver Friendly Society were registered as the proprietors of the land, and the present trustees of that society were the first three defendants to the action.

On the same day, February 21, 1947, the entry of the mortgage on the charges register was cancelled in fulfilment of the following transactions. By an agreement in writing dated January 10, 1947, Grove Hall Court Ltd. sold the land in fee simple to the Royal Liver Friendly Society. By clause 9 of that agreement: "The property is sold subject to the following: "(a) the existing leases or tenancies of the flats at the said "property, (b) a lease of the garages forming the rear part of the "said property dated July 26, 1938, in favour of Weg Motors "Ltd. for a term of 21 years from the twenty-fifth day of "December, 1938 (determinable at tenant's option at end of 7th "or 14th year) at the rent of £1,500 per annum. By an agree-"ment dated July 26, 1938, the lessee has an option exercisable "at any time prior to December 25, 1959, to take a further term "of 21 years from the date of the exercise of such option at the "same rent and conditions as in the existing lease. Copies of "the counterpart lease and option agreement mentioned in (b) "above having been furnished to the purchasers or their solicitors "(whether the purchasers inspect the originals or not) the pur-"chasers shall be deemed to have full knowledge of the contents "thereof and shall raise no objection or requisition with regard "thereto or with regard to the leases and tenancies referred to "in (a) above." Clause 7 of the agreement provided that the purchaser should on completion grant to the vendor, Grove Hall Court Ltd., a lease of the property thereby agreed to be sold at a rental of £5,000 per annum for a term of 150 years from the date of completion of the sale. Clause 11 provided that the sale was subject to the vendor obtaining from the Standard Life Assurance Company (the mortgagee of the property) a release of the freehold interest in the property and an acceptance by way of substituted security of the lease to be granted to the vendor pursuant to condition 7 thereof; and the completion of the sale and purchase and of the grant of the lease thereunder was to be conditional upon the completion of the release and substituted security by the Standard Life Assurance Company.

By a transfer dated February 11, 1947, Grove Hall Court Ltd. transferred the land to the then trustees of the Royal Liver Friendly Society subject to the exceptions, reservations, covenants and other matters set out or referred to in the entries in the register of the titles so far as they were still subsisting and capable of being enforced and affecting the properties included in the titles. That transfer was completed by the appropriate entry on the register of February 21, 1947.

By a lease dated February 11, 1947, the trustees of the Royal Liver Friendly Society demised the land to Grove Hall Court Ltd. for the term of 150 years from February 11, 1947, subject (a) to and with the benefit of the existing leases and tenancies of the flats and garages, and (b) to the exceptions, reservations and covenants and other matters set out or referred to in the entries at the Land Registry under the title numbers of the land at the yearly rent of £5,000. By clause 2 (14) of the lease, Grove Hall Court Ltd. covenanted to observe and perform such of the covenants and stipulations set out or referred to in the entries contained in the title numbers as were still subsisting and capable of taking effect and to keep the landlords effectively indemnified from all claims, costs, expenses and demands in respect thereof.

By a deed of substituted security of the same date and made between Grove Hall Court Ltd., the Standard Life Assurance Company and the trustees of the Royal Liver Friendly Society, reciting an agreement for the substitution of the leasehold interest in the land for the freehold interest therein by way of security for the payment of the principal moneys and interest owing under the mortgage of July 8, 1937, Grove Hall Court Ltd. demised the land comprised in the lease to the Standard Life Assurance Company for the term of 150 years less the last 10 days thereof, and the Standard Life Assurance Company surrendered to the trustees (who were described as "the reversioners") the land comprised in the freehold titles to the intent that the term subsisting therein by virtue of the deeds referred to in the recitals (which included the mortgage of July 8, 1937), or any of them might cease and merge in the reversion immediately expectant thereon. In fact, no actual term had subsisted under the mortgage of July 8, 1937. On February 21, 1947, the entry on the charges register relating to the mortgage of July 8, 1937, was cancelled. As the result of these transactions a new good leasehold title was registered at the Land Registry in respect of the land, and Grove Hall Court Ltd. were registered on February 21, 1947, as proprietors.

By a registered transfer dated July 10, 1959 (after the issue of the writ in the action on June 29, 1959), Grove Hall Court Ltd. transferred to the fifth defendants, Daejan Investments (Grove Hall) Ltd., the leasehold interest in the land. The transfer was completed by registration of that company as the proprietors of the leasehold interest on September 2, 1959. But in the meantime a caution had been put on the leasehold title in favour of the plaintiff company on August 21, 1959.

By notices dated April 30, 1959, the plaintiff company's solicitors, on behalf of the plaintiff company, gave notice to Grove Hall Court Ltd., the Standard Life Assurance Company and the Royal Liver Friendly Society requiring a renewed lease of the land for a further term of 21 years from the date of service of the notices, in accordance with the agreement of July 26, 1938.

Prior to this, on April 14, 1959, the plaintiff company's solicitors had written to the Standard Life Assurance Company explaining the circumstances and asking whether the company were agreeable to the grant to the plaintiff company of a lease in accordance with the option. On April 24, 1959, the assistant investment manager of the assurance company replied that the company considered that their consent would not be required to the grant of any lease for any period up to 21 years. On June 23, 1959, the plaintiff company's solicitors, being uncertain whether the officers of the assurance company had really appreciated the points involved, wrote again to the assurance company explaining the situation, and on July 1, 1959, the assistant investment manager of the assurance company replied that that company had not anything to add to their letter of April 24, and thanking the solicitors for writing so fully. In fact, all moneys due to the Standard Life Assurance Company of Edinburgh were paid off on or before September 2, 1959.

The defendants were not prepared to agree to the granting of a lease in accordance with the option to the plaintiff company, and accordingly, on June 29, 1959, the plaintiffs issued a writ against the first three defendants, the trustees of the Royal Liver Friendly Society and Grove Hall Court Ltd., claiming specific performance of the agreement of July 26, 1938, containing the option for the grant of a further lease. The fourth and fifth defendants, Grove Hall Court Ltd. and Daejan Investments (Grove Hall) Ltd., were added as defendants as a result of their

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acquisition of the leasehold interest. G.R. Investments ceased to exist upwards of 15 years ago.

R. W. Goff Q.C. and *Ivor Phillips* for the plaintiff company. Apart from any objection on the score of perpetuity the option to renew the lease is enforceable against the defendants since they took subject to the entries on the register, and in any event the plaintiffs' interest was overriding since they were in occupation at all material times. Further, no such objection can be sustained because agreements to renew leases are an anomalous exception to the rule against perpetuities: *Bridges* v. *Hitchcock*[2]; *Hare* v. *Burges*[3]; *London & South-Western Railway Co.* v. *Gomm*[4]; *Muller* v. *Trafford*[5]; *In re Tyrrell's Estate*[6]; *Woodall* v. *Clifton*[7]; *Rider* v. *Ford*[8]; Emmett on Title, 13th ed. (1953), vol. 2, p. 752. The basis of the exception is unknown; Farwell J. suggested in *Muller* v. *Trafford*[9] that it rests on the option running with the reversion under statute or on its being annexed to the land, but it is difficult to find a logical justification: *Woodall* v. *Clifton.*[7] *Griffith* v. *Pelton*[10] is distinguishable, for there the question was whether the plaintiff was an assignee of the benefit of the option and not whether an assignee of a benefit can enforce it against the successors in title of the grantor.

It appears from *Gomm's* case[11] and *Woodall* v. *Clifton*[12] that an option to renew a lease can be enforced as a matter of contract on the general equitable principle that it creates an interest in land enforceable against a purchaser for value with notice.

Alternatively, the option was a covenant having "reference "to the subject-matter of the lease" within the meaning of section 142 of the Law of Property Act, 1925, and it therefore runs with the reversion under that section. [Reference was made to Hill & Redman's Law of Landlord and Tenant, 12th ed. (1955), p. 642; *Richardson* v. *Sydenham*[13]; *Simpson* v. *Clayton*[14]; *Muller* v. *Trafford.*[15]] The issue is whether, the option being in an independent document not under seal, it can be a covenant. The common form is an agreement under seal, but the section has been

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[2] (1715) 5 Bro.P.C. 6, H.L.

[3] (1857) 4 K. & J. 45.

[4] (1882) 20 Ch.D. 562, C.A.

[5] [1901] 1 Ch. 54.

[6] [1907] 1 I.R. 292.

[7] [1905] 2 Ch. 257; 21 T.L.R. 581, C.A.

[8] [1923] 1 Ch. 541.

[9] [1901] 1 Ch. 54.

[10] [1958] Ch. 205; [1957] 3 W.L.R. 522; [1957] 3 All E.R. 75, C.A.

[11] 20 Ch.D. 562.

[12] [1905] 2 Ch. 257.

[13] (1703) 2 Vern. 447.

[14] (1838) 4 Bing.N.C. 758.

[15] [1901] 1 Ch. 54.

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applied where there is no demise under seal. Section 142 does not require an option to renew a lease to be in the lease; it is only necessary that it should have been granted with reference to the lease and as part of that transaction, and it is immaterial whether it was granted before or after the lease. The definition of "lease" in section 154 includes "an underlease or other "tenancy," so that section 142 applies to tenancies created by documents not under seal.

On the authority of decisions on section 10 (1) of the Conveyancing Act, 1881, the predecessor of section 141 of the Law of Property Act, 1925, "covenant" should not be construed strictly as an agreement under seal; *Cole* v. *Kelly* [16] and *Rye* v. *Purcell*,[17] which followed the general law of landlord and tenant; *Hayne* v. *Cummings* [18]; *Muller* v. *Trafford* [19]; *Doe* d. *Henniker* v. *Watt*,[20] which is a strong authority as the condition was not under seal, and Foa's General Law of Landlord and Tenant, 8th ed. (1957), p. 321. If this is correct and the case falls within section 142, on any view of the nature of the rule against perpetuities the plaintiffs are entitled to succeed as they fall within the dictum of Farwell J. in *Muller* v. *Trafford*.[21]

The option was not as a matter of construction personal to G. R. Investments Ltd.; it was granted on the same day as the lease and in consideration of it, so that the creation of the relationship of landlord and tenant was an essential basis of the contract, and it was expressed to be made between G. R. Investments Ltd., "hereinafter called the lessors. . . ." The lessors had power within section 142 to grant the option. It was an option to renew the lease as opposed to an option to grant a new lease intended to operate after the expiration of the old lease, and a term must be implied that the option was only exercisable while the lease was subsisting; the term is implied to give the contract business efficacy and not to save the agreement from infringing the rule against perpetuities.

It is incorrect to say that an original party to a contract who has parted with his interest must always be before the court, and the plaintiffs' claim cannot fail on this ground. It is impossible for a company which has ceased to exist to appear and the court will not allow itself to be stultified. [Reference was made to *Clark* v. *Alexander*.[22]]

[16] [1920] 2 K.B. 106; 36 T.L.R. 262, C.A.

[17] [1926] 1 K.B. 446.

[18] (1864) 16 C.B.N.S. 421, 426-427.

[19] [1901] 1 Ch. 54.

[20] (1828) 8 B. & C. 308.

[21] [1901] 1 Ch. 54, 61.

[22] (1884) 28 S.J. 616.

The agreement was not invalidated by section 149 (3) of the Law of Property Act, 1925, as it was not a contract to grant a reversionary lease: *In re Strand and Savoy Properties Ltd.*[23] The plaintiffs are protected by registration: see *Beesly* v. *Hallwood Estates Ltd.*[24] and sections 3 (ix), 9, 10, 20, 23, 48 and 49 of the Land Registration Act, 1925.

H. E. Francis Q.C. and *A. A. Baden Fuller* for the fourth and fifth defendants, Grove Hall Court Ltd. and Daejan Investments (Grove Hall) Ltd. (1) The contract was created by the option agreement and notice; it cannot be enforced by specific performance since the action is not properly constituted for that purpose, as the original contracting party, G.R. Investments Ltd., who alone were bound in contract by the option agreement, is not a party to this action and could not have been made one since it has been dissolved. Although it is established that the benefit under a contract can be assigned, an obligation can only be transferred to a third party by way of novation: *per* Jenkins L.J. in *Griffith* v. *Pelton*[25]: the sentence beginning "But inasmuch ". . ." is accepted, but the option can only be enforced by way of specific performance, which is a contractual remedy, if the parties to the contract are before the court: see Fry on Specific Performance, 6th ed. (1921), pp. 85, 90; *Tasker* v. *Small*[26]; *Potter* v. *Sanders*.[27] On granting specific performance against a party contractually bound, the court will, by way of ancillary relief, direct a party who acquired the land after, but with notice of the contract, to convey the land. There are indications in *Woodall* v. *Clifton*[28] that Romer L.J. had this in mind. A nexus can be established between the plaintiff and the defendants only (a) by suing on the contract, obtaining a decree of specific performance against the party contractually bound with an ancillary order directing the person affected by notice of the contract to convey, or (b) by showing that the obligation to grant the lease ran with the reversion under section 142.

(2) If point (1) is good, then the plaintiffs can only succeed if the obligation ran with the reversion under section 142. It did not so run for the following reasons: (i) It was not a covenant entered into by the lessor within the meaning of section 142, but it arose under a contract collateral to the

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[23] [1960] Ch. 582; [1960] 3 W.L.R. 1; [1960] 2 All E.R. 327.

[24] [1960] 1 W.L.R. 549; [1960] 2 All E.R. 314.

[25] [1958] Ch. 205, 225.

[26] (1837) 3 My. & Cr. 63.

[27] (1846) 6 Hare 1.

[28] [1905] 2 Ch. 257, 274, 278.

lease. Section 142 only applies to a covenant which is a term of the lease or tenancy, and it does not include a stipulation contained in a collateral agreement. An agreement entered into as part of the consideration for taking a lease is a collateral agreement: Woodfall on Landlord and Tenant, 25th ed. (1954), p. 572; *Erskine* v. *Adeane*.[29] The term granted by the lease began on December 25, 1938, so that there was no reversion as such in G.R. Investments Ltd. at the date of the option agreement: see *Muller* v. *Trafford*.[30] The agreement is in no way dependent on the continuance of the term granted by the lease: see clause 2 of the agreement. (ii) The obligation under the option agreement did not directly concern the land regarded as the subject-matter of the lease but was capable of arising independently of the relationship of landlord and tenant. Section 142 only applies to obligations which are incidental or annexed to and coterminous with that relationship. The wording of section 142 presupposes on the one hand a reversionary estate to which the obligation can be annexed, and on the other hand, that there is a term of years in someone who can take the benefit. The concurrence of the reversionary and leasehold estates is essential to the operation of the section. See the test in Cheshire's Modern Law of Real Property, 8th ed. (1958), pp. 426, 427, which was approved in *Breams Property Investment Co. Ltd.* v. *Stroulger*.[31] If that test is applied here the option did not affect G.R. Investments Ltd. as the lessors but as owners of the fee simple, and it does not therefore depend on the continuance of the relationship of landlord and tenant. If the lease had been determined under clause 4 the option would have continued until December 21, 1959, and it was therefore independent of the relationship. (iii) Under section 142 the obligation runs with the reversion only if and so far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lessor. G.R. Investments Ltd. had no power to do this, since their fee simple estate was subject to a mortgage which excluded their statutory power of leasing save so far as preserved by clause 15, which was exhausted by the lease granted to the plaintiffs. Even if they had had power to do so the lease should have complied with section 99 (6) of the Law of Property Act, 1925, and have reserved the best rent, while it has been conceded that £1,500 per annum was not the best rent at the date of the exercise of

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[29] (1873) L.R. 8 Ch. 756, 766.

[30] [1901] 1 Ch. 54, 63.

[31] [1948] 2 K.B. 1, 7; 64 T.L.R. 292; [1948] 1 All E.R. 758, C.A.

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the option. Alternatively, the relevant reversion was the mortgage term deemed to be vested in the mortgagee as chargee by way of legal mortgage: section 3 (1) of the Land Registration Act, 1925, section 87 of the Law of Property Act, 1925, and Brickdale and Stewart Wallace's Land Registration Act, 1925, 4th ed. (1939), p. 70. The relevant date for determining whether G.R. Investments Ltd. had power to bind the estate was the date on which the option agreement was entered into: *Muller* v. *Trafford.*[32] True a lease by a mortgagor without statutory leasing powers binds everyone except the mortgagee, but this is so by reason of the operation of the doctrine of estoppel and not because the mortgagor has power in law to grant a lease; power in section 142 means a legal power. [Reference was made to Halsbury's Laws of England, 3rd ed. (1956), vol. 15, pp. 247, 248; *Rust* v. *Goodale.*[33]] The plaintiffs are not in possession under a tenancy as neither Grove Hall Court Ltd. nor Daejan Investments (Grove Hall) Ltd., nor their predecessors in title have acknowledged it. The reversion was transferred subject to the option in order to protect the party conveying from liability on the covenants for title.

(3) If either (1) or (2) is bad, the interest which the plaintiffs are seeking to enforce is void for perpetuity. This was not a covenant to renew a lease, as that means a covenant to extend or renew a term from the expiration of a prior term, and it is essential that there should be continuity between the old and new terms: *Regor Estates Ltd.* v. *Wright*[34]; *Woodall* v. *Clifton*[35]; *Rider* v. *Ford.*[36] It was a covenant to grant a new future lease which could be implemented after an interval from the expiry of the original term of 21 years. Further, the option was registered as an option to take a lease and not as an option to renew a lease. The court will not imply a term to save a contract from being void for perpetuity.

The exception of covenants to renew leases is anomalous and the courts will not extend it to those which are not strictly covenants to renew: *In re Hunter's Lease.*[37]

John L. Arnold Q.C. and *Eric Griffith* for the first, second and third defendants, the trustees of the Royal Liver Friendly

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[32] [1901] 1 Ch. 54, 61.

[33] [1957] Ch. 33, 44; [1956] 3 W.L.R. 749; [1956] 3 All E.R. 373.

[34] [1951] 1 K.B. 689; [1951] 1 T.L.R. 242; [1951] 1 All E.R. 219, C.A.

[35] [1905] 2 Ch. 257, 279.

[36] [1923] 1 Ch. 541.

[37] [1942] Ch. 124; 58 T.L.R. 116; [1942] 1 All E.R. 27.

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Society. When the friendly society granted the long leasehold on February 11, 1947, the reversion was in Grove Hall Court Ltd.; the friendly society as owners of the freehold could not grant any term to the plaintiffs since section 142 makes the obligation binding on the reversionary estate immediately expectant on the lease, and that estate must crystallise when the obligation becomes binding.

The following are the limits to the anomalous exception of options to renew leases: the contract must be between the landlord and tenant; it must be for the renewal of a term and be exercisable only so long as the relationship exists. The present option fails to fulfil these requirements since it was between persons about to enter into the relationship; on its true construction it was an option to take a term irrespective of the subsistence of the term granted by the 1938 lease, and the language excludes the necessity of the lease being on foot when the option was to be exercised. If a period is stated in the instrument, there is no room for the interpolation of a limit coterminous with the leasehold term: *Rider* v. *Ford*.[38] Nor is there any ground for introducing an implied term into the agreement that the option is only to be exercised while the relationship of landlord and tenant subsists; the only purpose in so doing can be to attempt to save the option from being void for perpetuity, and the court will not imply a term for this purpose: Halsbury's Laws of England, 3rd ed. (1954), pp. 121, 122; *Hamlyn & Co.* v. *Wood & Co.*[39]

R. W. Goff Q.C. in reply. The reversion at the date of the grant of the option was the freehold vested in G.R. Investments Ltd. The burden of the option cannot be shifted on to the long leasehold which was created subsequently.

Cur. adv. vult.

November 3. DANCKWERTS J. read the following judgment, in which he stated the facts as set out above, observed that, had the statutory power of leasing been restricted by the mortgage of July 8, 1937, difficulties might arise not only in respect of the lenders' consent to the lease of July 26, 1938, but also because, when the option was exercised, the annual rent of £1,500 provided was admittedly not at that date the best rent that could reasonably be obtained pursuant to section 99 (6) of the Law of Property Act, 1925, and that it was plain that the sale of January 10, 1947, was subject to the existence of the lease and the plaintiffs' option, and presumably those encumbrances affected the price paid for

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[38] [1923] 1 Ch. 541, 546–547.

[39] [1891] 2 Q.B. 488, 491, C.A.

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the property, and continued: Although the land appears to have been sold by Grove Hall Court Ltd. to the Royal Liver Friendly Society or the trustees thereof on the footing that the land was subject to the option agreement as well as the lease of July 26, 1938, numerous technical points have been raised by the defendants. On behalf of the trustees of the Royal Liver Friendly Society, some attempt was made to distinguish their position on the ground that they were not involved in the granting of the lease as the long leasehold interest was the immediate reversion on the plaintiff company's leasehold term. But it seemed to me that these defendants really made common cause with the two defendant companies in the action.

One of the objections taken was that the action was not properly constituted because the party to the agreement creating the option, G.R. Investments Ltd., was not a defendant in the action. G.R. Investments Ltd. ceased to exist at some date during the last war. I am far from satisfied that, where the original party has parted with all his interest in the property concerned, he is a necessary party to an action to enforce an equity which is binding on a purchaser who has acquired the property with notice or for other reasons is bound by the obligation in question. But where, as in the present case, the original party has completely gone out of existence, it would be ridiculous that a defendant should be entitled to object to the absence of that party from the action. This objection, in my opinion, has no force. Of course, only a contracting party can be made liable in damages for a breach of a contractual obligation, but that is quite a different matter.

The most important question which arises, in my view, is whether the agreement containing the option was a covenant for the renewal of a lease. If it was not such a covenant, it seems clear that, so far as it amounted to an attempt to create an interest in land, it would be invalid by reason of the rule against perpetuities: *London & South-Western Ry.* v. *Gomm* [1]; *Woodall* v. *Clifton* [2]; *Rider* v. *Ford.*[3] But if the agreement is one for the renewal of a lease, the matter is not affected by the rule against perpetuities at all. Covenants for the renewal of leases are said to be an anomalous case which should not be extended. It seems to me to be quite a sensible exception. It appears that covenants for the renewal of leases had become established as valid long before the rule against perpetuities was evolved to prevent unbarrable entails, and they do not seem to me to be involved in the abuses which the rule against perpetuities sought to correct.

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[1] (1882) 20 Ch.D. 562, C.A.

[2] [1905] 2 Ch. 257; 21 T.L.R. 581, C.A.

[3] [1923] 1 Ch. 541.

But it was argued strenuously that the agreement of July 26, 1938, did not amount to an option for the renewal of a lease but was a provision for the granting of a new lease which might be implemented after an interval from the expiry of the original term of 21 years. Clause 1 of the option agreement creates an option of taking " a further lease of the premises." By clause 2 the option is " exercisable by notice in writing " at any time before December 25, 1959, when the term of 21 years would have run its full course, if not determined by the tenant at the end of the first seven or 14 years or by the landlord entering under the condition of re-entry. It is said, therefore, that the period during which the option might be exercised is not bound to the continuation of the relation of landlord and tenant between the parties, and reliance is placed upon the description in the charges register of the absolute title under the Land Registration Act, 1925, as " an option to take a lease " and not an option to renew the lease. It was suggested that this description must or might be based on the description in the application form, and further discovery was asked for. I do not think this point amounts to anything, because the description in the charges register seems to me to be not inconsistent with an option for renewal, and in any case could not contradict the terms of the option itself.

On the construction of the agreement of July 26, 1938, I think that the option is an option for the renewal of the lease. In consideration of the lessees taking the lease of even date, the lessees are given the option of " taking a further lease." The fixing of the end of the period during which the option is exercisable coincides with the end of the term of 21 years granted by the lease of the same date, and it seems to me to be inconceivable that the option was to be exercisable when the term had been determined by the lessees or by their forfeiture of the lease and the exercise by the landlords of the condition of re-entry. In the result, I hold that the option was only exercisable while the relationship of landlord and tenant continued. I reach this conclusion as a matter of construction; but I think it would be admissible in this case to imply a term to the same effect.

As MacKinnon L.J. said in *Shirlaw* v. *Southern Foundries (1926) Ltd.*[4]: " Prima facie that which in any contract is left to

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[4] [1939] 2 K.B. 206, 227, C.A.

"be implied and need not be expressed is something so obvious "that it goes without saying; so that, if, while the parties were "making their bargain, an officious bystander were to suggest "some express provision for it in their agreement, they would "testily suppress him with a common 'Oh, of course!'" He added: "At least it is true, I think, that if a term were never "implied by a judge unless it could pass that test, he could not "be held to be wrong."

I feel quite sure that if in July, 1938, the officious bystander had asked, "Are the lessees to be able to exercise the option "when they have determined the lease or forfeited it?" the answer would have been "Don't be silly; of course not."

Another objection was based on the fact that the option was conferred by a document separate from the lease and executed, it appears, immediately before the lease itself was executed. So far as these points are concerned, in my view, the option agreement and the lease must be treated as one transaction. After all, in the option agreement the respective parties are described as "the lessors" and "the lessees." It is, of course, not really possible to execute two documents exactly simultaneously. In my view all the circumstances point to the agreement and the lease being regarded by the parties as part of the same transaction.

Another matter, which can be dealt with shortly, arises under section 149 (3) of the Law of Property Act, 1925. This subsection provides that a term, at a rent or granted in consideration of a fine, limited after the commencement of the Act to take effect more than 21 years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void.

But in *In re Strand and Savoy Properties Ltd.*,[5] Buckley J. held that the subsection so far as it applied to contracts was confined to, and only rendered void, contracts to grant leases which, when created, would be reversionary leases, the postponement of the commencement of the term being for more than 21 years from the date of the lease, and did not invalidate a contract to create a lease at however remote a date in the future, which, when granted, would create a term taking effect within 21 years of the date of that lease. Buckley J. consequently held that the option in that case for renewal to take effect as a further term of 35 years from the expiration of the term of 35 years originally granted was a valid provision. I agree with that decision and follow it. It was not contended on behalf of the defendants that I should not do so, but they wished to keep the point open in case this case should go further.

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[5] [1960] Ch. 582; [1960] 3 W.L.R. 1; [1960] 2 All E.R. 327.

The defendants did not, I think, seriously contend that, if other objections failed, they had not effective notice of the plaintiff company's rights under the option agreement by reason of the entries on the freehold title under the Land Registration Act, 1925. It is plain that the plaintiff company was adequately protected: see Land Registration Act, 1925, ss. 3 (ix), 9, 10, 20, 23, 48 and 49; and *Beesly* v. *Hallwood Estates Ltd.*[6] But it was contended that the option was ineffective on a number of grounds.

Mr. Francis, who appeared for the two defendant companies, contended that the plaintiff company could only succeed if the obligation ran with the reversion under section 142 of the Law of Property Act, 1925. He based this contention on three points: first, that the option was not a covenant entered into within the meaning of the section; second, that the obligation did not have reference to the subject-matter of the lease as interpreted by decisions of the court, and third, that G.R. Investments Ltd. had no power to bind the reversionary interest immediately expectant upon the leasehold term.

The first point was based on the circumstance that the option agreement was not under seal, and the contention that in any case it was merely a collateral agreement. As regards this contention, I have already expressed the view that the lease and the option agreement must be treated as one transaction, and the agreement for the lessees to have an option for the renewal of the lease seems to me to be an integral part of the transaction. I do not regard it as merely collateral.

As regards the meaning of the word "covenant" in section 142, the word is often used to describe a contract under seal or in a deed. But in the law of landlord and tenant I do not think that the word is confined to that meaning. It is commonplace to have tenancies by agreements which are not under seal and are not required by law to be made by deed. The stipulations contained in such agreements are generally treated as running with the land, and section 142 of the Law of Property Act, 1925, cannot have been intended to upset the law of landlord and tenant in this respect.

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[6] [1960] 1 W.L.R. 549; [1960] 2 All E.R. 314.

Mr. Goff, for the plaintiff company, was able to satisfy me on this point. This view is supported by *Doe* d. *Henniker* v. *Watt*[7]; *Hayne* v. *Cummings*[8]; and see *Muller* v. *Trafford.*[9] And a similar construction has been applied to section 10 of the Conveyancing Act, 1881, and section 141 of the Law of Property Act, 1925: see *Cole* v. *Kelly.*[10]

Under section 142 of the Law of Property Act, 1925, "The " obligation under a condition or of a covenant entered into by " a lessor with reference to the subject-matter of the lease shall, " if and as far as the lessor has power to bind the reversionary " estate immediately expectant on the term granted by the lease, " be annexed and incident to and shall go with that reversionary " estate, or the several parts thereof." By section 154, " 'lease' " includes an underlease or other tenancy." This makes it clear that section 142 is intended to apply to tenancies created by documents which are not under seal, in the same manner.

As to the argument under point two, that the option was not " with reference to the subject-matter " of the lease, a phrase which the section substitutes for the former description of " touching and concerning the land," a covenant for renewal has always been regarded as one touching and concerning the land, in this respect differing from an option to acquire the freehold: see *Richardson* v. *Sydenham*[11]; *Simpson* v. *Clayton*[12]; *Muller* v. *Trafford.*[13]

Mr. Francis's argument on this point was also involved in his submissions as to the nature of the option in the present case, with which I have dealt previously. Professor Cheshire, in his book Modern Real Property, 8th ed. (1958), pp. 426–427, on which Mr. Francis relied, in fact lists a covenant to renew a lease as one of the covenants touching and concerning the land. Professor Cheshire's observations on personal and collateral covenants, which are not capable of running with the land, are plainly not applicable to the option in the present case.

Point three of Mr. Francis's contentions depended on the existence at the date of the option agreement of the mortgage of July 8, 1937. Section 142 only applies if and so far as the lessor had power to bind the reversionary estate immediately expectant on the term granted by the lease. At that date G.R.

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[7] (1828) 8 B. & C. 308.

[8] (1864) 16 C.B.N.S. 421, 426–7.

[9] [1901] 1 Ch. 54.

[10] [1920] 2 K.B. 106; 36 T.L.R. 262, C.A.

[11] (1703) 2 Vern. 447.

[12] (1838) 4 Bing.N.C. 758, 780.

[13] [1901] 1 Ch. 54, 60.

Investments were the owners of the freehold and the mortgage did not in fact create any term of years, because it was a charge by way of legal mortgage.

It is true that section 87 of the Law of Property Act, 1925, provides that the mortgagee shall have the same protection, powers and remedies as if a mortgage term of 3,000 years had been created; and section 3 (1) of the Land Registration Act, 1925, provides that " charge by way of legal mortgage " means a mortgage created by charge under which, by virtue of the Law of Property Act, 1925, the mortgagee is to be treated as an estate owner in like manner as if a mortgage term by demise or sub-demise were vested in him. Sections 87 and 205 (1) (xvi) of the Law of Property Act, 1925, however, do not describe such a mortgagee as an estate owner, and where a mortgagee converts his mortgage into a charge by way of legal mortgage under section 87 (2), the mortgage term is to be extinguished in the inheritance or the head term, as the case may be. It appears to me that the only reversionary estate at the date of the option agreement was the fee simple which was vested in G.R. Investments Ltd.

There is then the question whether G.R. Investments Ltd. had the power to bind the reversionary estate by the option. Assuming that the option fell within the restriction on the statutory powers of leasing contained in clause 15 of the mortgage, there is much to be said for the view that due written consent was given to the option by the Standard Life Assurance Co. by their letters in 1959. That assurance company, after all, was the only person entitled to object under the clause in the mortgage, and that person was not raising any objection.

There is another and even stronger answer, in my view, to the contentions of the defendants. G.R. Investments Ltd. was the owner in fee simple and had the powers of such an owner to make a lease of the land, apart from the statutory powers of leasing contained in section 99 of the Law of Property Act, 1925. A lease granted under such powers must be effective against anyone other than the mortgagee and persons claiming through the mortgagee, at the worst. If the mortgagee does not object, who else can object to the validity of the lease?

Moreover, in 1947, the mortgagee released the fee simple from the charge and accepted in substitution a charge on the term of 150 years then created, which was subject to the rights of the plaintiff company. Any protection under section 87 of the Law

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of Property Act, 1925, in respect of the freehold estate must have disappeared. And even the charge on the term of 150 years disappeared when subsequently the moneys due to the assurance company were paid off.

In my view, G.R. Investments Ltd. had power to bind the reversionary estate immediately expectant on the term granted by the lease and the option. If the defendants are barred by the option by reason of the provisions of section 142 of the Law of Property Act, 1925, it is not really necessary to consider Mr. Goff's other contention that, as the plaintiff company was at all material times in possession, the option constituted an "over-"riding interest," to which a purchaser of the land would be subject, quite apart from registration under the Land Registration Act, 1925: see *Hunt* v. *Luck*,[14] in which it was held that a purchaser of land of which a tenant is in occupation has notice of all that tenant's rights. In that case Farwell J. said [15]: "I take "the law as stated in 1853 by Lord Kingsdown (then Mr. "Pemberton Leigh), in *Barnhart* v. *Greenshields* [16]: 'With "'respect to the effect of possession merely, we take the law to "'be, that if there be a tenant in possession of land, a purchaser "'is bound by all the equities which the tenant could enforce "'against the vendor, and that the equity of the tenant extends "'not only to interests connected with his tenancy, as in *Taylor* "'v. *Stibbert*,[17] but also to interests under collateral agreements, "'as in *Daniels* v. *Davison*,[18] *Allen* v. *Anthony*,[19] the principle "'being the same in both classes of cases; namely, that the "'possession of the tenant is notice that he has some interest "'in the land, and that a purchaser having notice of that fact, "'is bound, according to the ordinary rule, either to inquire what "'that interest is, or to give effect to it, whatever it may "'be. . . .'" Mr. Goff's contention thus appears to be fully supported.

Mr. Arnold, on behalf of the trustees of the Royal Liver Friendly Society, contended that his clients could not be affected by any relief which the plaintiff company could claim in the action, and that they ceased to be reversioners when the lease for 150 years was granted in 1947. But in the present case the lease and the option for renewal were granted by the freeholder, and

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[14] [1901] 1 Ch. 45.

[15] Ibid. 49.

[16] (1853) 9 Moo.P.C. 18, 32.

[17] (1794) 2 Ves.Jr. 437.

[18] (1809) 16 Ves. 249; (1811) 17 Ves. 433.

[19] (1816) 1 Mer. 282.

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there is force in Mr. Goff's argument that the plaintiff company are entitled to a further lease from the freeholders and not merely an underlease from the lessees of the 150-year term. The trustees, as the present freeholders, are as much bound by the lease and the option, and are bound to give effect to the option, if binding. In my opinion, the plaintiff company was fully justified in making the trustees defendants and asking for relief against them. In any case, the trustees retain the freehold estate, and the term of 150 years might be ended prematurely by forfeiture or surrender.

When I was disinclined to accept the elimination of the trustees from the matter, Mr. Arnold pursued the arguments put forward on behalf of the other defendants, and his clients, in my opinion, must be taken to have adopted quite as hostile an attitude to the claims of the plaintiff company.

Judgment for the plaintiffs, with costs, save costs occasioned by certain amendments.

Solicitors: *Curwen, Carter & Evans; Sharpe, Pritchard & Co. for Bremner, Sons & Corlett, Liverpool; Franks, Charlesly & Co.*

M. G. T.

THAMES LAUNCHES LTD. *v.* TRINITY HOUSE CORPORATION (DEPTFORD STROND).

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Buckley J.

[1960 T. No. 550.]

Injunction—Criminal proceedings—Proceedings in High Court—Subsequent criminal proceedings in magistrates' court raising substantially same issue—Jurisdiction to restrain prosecutors from proceeding with criminal proceedings—Whether criminal proceedings vexatious —Whether injunction will issue.

On April 13, 1960, the plaintiff company issued an originating summons in the Chancery Division of the High Court which raised certain questions on the construction of the Pilotage Act, 1913, and in particular of section 11 of that Act. On October 21, 1960, two summonses against J. W., an employee of the plaintiff company, were issued out of the Thames Metropolitan Magistrates'

Court on informations laid by an employee of the defendants acting in the course of his duties and as their agent alleging that he had committed offences under sections 11 and 43 of the Act on May 18, 1960. The two summonses in the magistrates' court raised substantially the same questions of law as were raised by the originating summons in the High Court.

On a motion by the plaintiffs to restrain the defendants from further proceeding against J. W. on the two summonses in the magistrates' court until the final determination of the matter of construction raised by the originating summons:—

Held, (1) that where matters which involved substantially the same issues were raised in civil proceedings and, at a later stage, by criminal proceedings, the court had jurisdiction to restrain the prosecutors from continuing the criminal proceedings until the civil proceedings had been decided (post, p. 204).

York Corporation v. *Pilkington* (1794) 2 Atk. 302 applied.

(2) That the court would exercise that jurisdiction only if it was satisfied that it would be vexatious to allow the criminal proceedings to proceed pending the decision of the civil proceedings; and that it was vexatious for a party to institute proceedings to obtain relief in respect of a particular matter when exactly the same issue was raised by his opponent in proceedings already instituted in another court in which he was not plaintiff but defendant (post, pp. 204, 209).

In re Connolly Brothers Ltd. [1911] 1 Ch. 731, C.A. applied.

(3) That since, in substance, the same questions of law were raised between the same parties in both sets of proceedings, in the circumstances the criminal proceedings should not be allowed to proceed until the question of construction had been decided in the Chancery Division; and that, therefore, the court would grant an injunction restraining the defendants from proceeding with the summonses against J. W. until the final determination of the questions raised by the originating summons or further order (post, p. 209).

MOTION.

On April 13, 1960, the plaintiff company, Thames Launches Ltd., which owned passenger boats which it operated on the River Thames, issued an originating summons against the Corporation of Trinity House of Deptford Strond for declarations (1) that on the true construction of the Pilotage Act, 1913, the plaintiff company was entitled to navigate its passenger-carrying vessels throughout the whole of the Port of London on pleasure tours operating from piers outside the London Pilotage District without being either (a) under the pilotage of a licensed pilot of the district, or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who was bona fide acting as master or mate of the ship; and (2) that, on the true construction of the Pilotage Act, 1913, the plaintiff company was entitled to navigate its passenger-carrying vessels throughout the whole of the Port of London on pleasure tours operating from piers inside or outside the London Pilotage District without being either (a) under the pilotage of a licensed pilot of the district, or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who was bona fide acting as master or mate of the ship. The summons was subsequently amended to include further claims for relief not material on the present motion.

On October 21, 1960, two summonses, based on informations laid by Sydney Rawlings Smith, the Principal of the Pilotage Department of Trinity House, were issued out of the Thames Metropolitan Magistrates' Court against J. Watson, a licensed waterman in the employment of the plaintiff company, alleging offences against sections 11 and 43 of the Pilotage Act, 1913, respectively. The first summons alleged that on May 18, 1960, Watson, being master of the m.v. *Viscountess*, navigated *Viscountess* (not being an excepted ship) in the River Thames below Tower Pier within the limits of the London Pilotage District, in circumstances in which pilotage was compulsory, *Viscountess* not being under the pilotage of either (a) a licensed pilot of the district, or (b) a master or mate possessing a pilotage certificate for the district who was bona fide acting as master or mate of the ship, after a licensed pilot had offered to take charge of the ship. The second summons complained that Watson on May 18, 1960, navigated *Viscountess* (not being an excepted ship) in the River Thames below Tower Pier within the limits of the London Pilotage District in circumstances in which pilotage was compulsory but failed to display a pilot signal and to keep the signal displayed until a licensed pilot came on board.

On November 16, 1960, the plaintiff company appeared by counsel before the Thames Metropolitan Magistrate and requested him to stay all further proceedings on the two summonses until the final determination of the matters raised by the originating summons, but the magistrate declined to do so.

By a notice of motion, dated November 24, 1960, the plaintiff company asked for orders restraining the defendants from (1) further proceeding against Watson on the two summonses until the final determination of the matter of construction raised by the originating summons, and (2) proceeding against any licensed waterman in respect of alleged offences contrary to sections 11 and 43 of the Pilotage Act, 1913, arising out of the

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navigation of passenger boats in the Port of London on pleasure trips operating from piers either inside or outside the London Pilotage District until the final determination of the matter of construction raised by the originating summons.

L. A. Blundell Q.C. and *K. R. Bagnall* for the plaintiff company. It is wrong in principle and on the authorities that the same matter should be litigated in two courts. When an issue has already been raised in proceedings in one court, it is vexatious to start parallel proceedings in another court which raise the same issue: *In re Connolly Brothers Ltd.*[1] It would be vexatious and oppressive for the defendants to proceed with the prosecution in the magistrates' court while the question of construction of the Pilotage Act, 1913, which goes to the root of this matter, is before the High Court. The plaintiff company is asking that the defendants should be restrained from continuing proceedings of a criminal nature. The proceedings in *In re Connolly Brothers Ltd.*[2] were Chancery proceedings. However, *Lord Montague* v. *Dudman*[3] and *York Corporation* v. *Pilkington*[4] are authority for restraining proceedings in magistrates' courts. The doubt expressed as to the latter case[5] by Sir George Jessel M.R. in *Kerr* v. *Preston Corporation*[6] was directed to quite a different point. This branch of the law was again considered by Sir George Jessel M.R. in *Hedley* v. *Bates*[7] and in *Stannard* v. *Vestry of St. Giles, Camberwell.*[8] The modern cases, such as *In re Connolly Brothers Ltd.*,[9] show that, notwithstanding *Kerr* v. *Preston Corporation*,[10] the judgment of Lord Hardwicke L.C. in *York Corporation* v. *Pilkington*[11] is good law.

J. V. Naisby Q.C. and *Gerald Darling* for the defendants. The proceedings in the magistrates' court are not vexatious or oppressive for the following reasons. In the first place, the proceedings in the magistrates' court and in the High Court are not between the same parties. In the magistrates' court, the prosecutor is the principal of the Pilotage Department of the defendants and the accused is the master of the vessel. In the proceedings in the High Court, the company is the plaintiff and Trinity House is the defendant. Secondly, the summons, even in its amended form, does not set out all the factors necessary for the decision of the case before the magistrates' court. If the defendants are restrained from proceeding in the magistrates' court until after the hearing of the originating summons, then, if the decision on the originating summons is in favour of the plaintiff company, there would be an end of the proceedings in the magistrates' court. However, if the decision were not in favour of the plaintiff company, the magistrates' court would have to hear and decide the case before it, which involves questions which are not raised in the High Court. The only question which is common to the case in the High Court and the case in the magistrates' court is the question of law. All the High Court is being asked to decide on the originating summons is the question of construction, and that is not something "over and above" what the magistrates' court is being asked to decide: see *per* Sir George Jessell M.R. in *Stannard* v. *Vestry of St. Giles, Camberwell.*[12]

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[1] [1911] 1 Ch. 731, C.A.

[2] Ibid.

[3] (1751) 2 Ves.Sen. 396.

[4] (1794) 2 Atk. 302.

[5] Ibid.

[6] (1877) 6 Ch.D. 463.

[7] (1880) 13 Ch.D. 498.

[8] (1881) 20 Ch.D. 190, C.A.

[9] [1911] 1 Ch. 731.

[10] 6 Ch.D. 463.

[11] 2 Atk. 302.

Even if the defendants are to be regarded as being, in substance, the prosecutors in the magistrates' court, the proceedings in that court are not vexatious because the defendants are not persons who are claiming relief in two courts, for they are defendants and not plaintiffs in the proceedings in the High Court: *Saull* v. *Browne.*[13] It is not vexatious for a defendant in one court to bring statutory proceedings in another court relating to the same subject-matter. It is the defendants' duty to see that the Pilotage Act, 1913, is properly observed in the area of the Thames, for they are the pilotage authority.

On the form of the notice of motion, the claim in paragraph (2) is far too wide.

Blundell Q.C. replied.

BUCKLEY J. This is a motion launched by the plaintiff company in proceedings which have been commenced in this division of the High Court by originating summons seeking relief against Trinity House, the Pilotage Authority for the Port of London. The motion seeks an injunction to restrain the defendants from proceeding with certain summonses pending before the Thames Metropolitan Court magistrate pending the determination of a question of construction of the Pilotage Act, 1913, which is raised in the originating summons. I am told that those summonses are due to be heard tomorrow.

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[12] 20 Ch.D. 190, 197.

[13] (1874) L.R. 10 Ch. 64.

The plaintiffs own and operate pleasure steamers in the area of the Port of London, and the defendants are the Pilotage Authority for that area. Section 11 of the Pilotage Act, 1913, lays down as follows: "Every ship (other than an excepted ship) "while navigating in a pilotage district in which pilotage is "compulsory for the purpose of entering, leaving, or making use "of any port in the district, and every ship carrying passengers "(other than an excepted ship), while navigating for any such "purpose as aforesaid in any pilotage district (whether pilotage "is compulsory or not compulsory in that district) shall be either "—(*a*) under the pilotage of a licensed pilot of the district; or "(*b*) under the pilotage of a master or mate possessing a pilotage "certificate for the district who is bona fide acting as master or "mate of the ship." Subsection (2) provides that, in the event of a breach of subsection (1), the master of the ship shall be liable in respect of each offence to a fine. "Excepted ships" are defined in subsection (3), but that definition is not relevant to the present case.

Section 43 of the Act is in the following terms: "(1) The "master of a ship (other than an excepted ship) shall when "navigating in circumstances in which pilotage is compulsory "under this Act, display a pilot signal, and keep the signal "displayed until a licensed pilot comes on board. (2) The master "of a ship, whether navigating in circumstances in which pilotage "is compulsory or not, which is being piloted in a pilotage district "by a pilot not licensed for the district, shall display a pilot "signal and keep the signal displayed until a licensed pilot comes "on board." Subsection (3) provides that if the master of any ship fails to comply with this section, he shall be liable in respect of each offence to a fine not exceeding £20.

[His Lordship stated the facts and continued:] It is conceded that the informations were laid by the complainant in his capacity as Principal of the Pilotage Department of Trinity House and as part of and in the course of his duties in that office, and that in respect of these two summonses he is acting on behalf of Trinity House. It is also in evidence that Watson, the respondent to the summonses, is in the employ of the plaintiff company, and that as such he was acting as the master of the vessel in respect of the matters complained of in the summonses.

Mr. Blundell, who appears for the plaintiffs, says that it would be wrong in principle for the magistrates' court to proceed to deal with the summonses while the point of construction is sub judice in this court, or, at any rate, it would be wrong for the defendant corporation to press on with those proceedings while this point of construction is sub judice in this court. He says that there is jurisdiction in this court to restrain proceedings which are in their nature vexatious because they tend to multiplicity of legal proceedings relating to the same subject-matter and substantially relate to the same relief.

He has referred me to a number of authorities in that connection. The first to which I should refer is *York Corporation* v. *Pilkington*.[1] The headnote to that case is as follows: " Whilst suits are depending here, the plaintiffs indict " the defendant's agent at the sessions, where they themselves " are judges, for a breach of the peace. Lord Hardwicke made " an order to restrain the plaintiffs from proceeding at the " sessions, till the hearing of the cause, and further order." Lord Hardwicke L.C. in his judgment said[2]: " This court has " not originally, and strictly, any restraining power over criminal " prosecutions; and, in this case, if the defendant had applied " to the Attorney-General, he would have granted a noli prosequi. " For when a complaint is grounded on a civil right, for which " an action of trespass would lie, the Attorney-General of course " grants a noli prosequi. This is a complaint merely for fishing " in the river, without any actual breach of the peace, which the " mayor and corporation say, is a trespass upon them. If it " could be made appear at law, that the plaintiffs were both " judges and parties, it might come out to be coram non judice, " but it might be difficult to make out this. If actions of trespass " had been brought vi et armis, this court would have stopped " them; but though I cannot grant an injunction, yet I may " certainly make an order upon the prosecutors to prevent the " proceeding on the indictment. Supposing it was a suit for a " right of land where entries had been made, and the bill was " brought to quiet the possession, and after that they prefer an " indictment for a forcible entry, which is of a double nature, as it " partakes of a breach of the peace, and is also a civil right, this " court would certainly stop the proceedings upon such indictment. Where parties submit their right to the court, they have " certainly a jurisdiction, and may interpose. Therefore I will " make an order to restrain the plaintiffs from proceeding at the " sessions, till the hearing of the cause and further order."

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[1] (1794) 2 Atk. 302.

[2] Ibid.

I have read the whole of Lord Hardwicke's judgment because it makes it clear that the part of the headnote which refers to the corporation being themselves judges in their own cause was not really any part of his decision; and it does establish that where matters which involve substantially the same issues are raised both in civil proceedings and at a later stage by criminal proceedings, this court can restrain the prosecutors in the criminal proceedings from continuing such proceedings until the civil proceedings have been decided.

Jurisdiction of that kind, in my judgment, is very clearly a jurisdiction which must be exercised with the greatest care; and this court would be very slow to interfere with the course of criminal proceedings unless it was clear that the issues in the civil proceedings and the criminal proceedings really raised in substance the same issue and that if the civil proceedings succeeded the criminal proceedings must necessarily fail. In principle the court discourages multiplicity of litigation in any form. In other words, the court must be satisfied that to allow the criminal proceedings to be proceeded with pending the decision of the civil proceedings would really be vexatious.

In that connection I must mention *In re Connolly Brothers Ltd.*,[3] the most recent authority to which I have been referred. That was not a case of civil and criminal proceedings, but of two sets of civil proceedings, one in the High Court and one in the County Palatine Court of Lancaster. The language of the judgment of the Court of Appeal, in my view, makes it clear that the basis on which they were proceeding was that to allow the case in the Palatine Court, which was instituted at a later stage than the case in the High Court, to go on would be vexatious. Lord Cozens-Hardy M.R. said[4]: "It is enough to say that the juris- "diction of the court in a case like this undoubtedly exists and "ought to be exercised if the court comes to the conclusion that "the defendant in the High Court action, the plaintiff in the "foreign action—in this case the Palatine action—acted vexa- "tiously in instituting the proceedings in the foreign action; and "from that point of view I have no hesitation in saying that the "proceedings taken by O'Reilly in the Palatine action were "vexatious and unreasonable to such an extent that the court "ought to exercise the jurisdiction which it plainly possesses "to grant an injunction." Fletcher Moulton L.J. said[5]: "It is

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[3] [1911] 1 Ch. 731, C.A.

[4] Ibid. 744.

[5] Ibid. 746.

"quite clear that the court has felt justified in exercising this "jurisdiction where it is satisfied that it would be vexatious to "let the other action proceed."

It seems to me that exactly the same principle must apply where the two sets of proceedings are a civil proceeding and a criminal proceeding as where there are two sets of civil proceedings.

I ought also to refer to *Hedley* v. *Bates*,[6] a decision of Sir George Jessel M.R. In that case "The plaintiffs and the defen"dant were the owners in fee simple of adjoining freehold "estates. . . . The defendant, in proceeding to make certain "drainage works on his estate, proposed, by putting in force the "powers given to landowners by the Land Drainage Act, 1861 . . . "to utilise and improve for the purpose a burn or watercourse "which flowed through the plaintiffs' land. Accordingly the "defendant, on November 4, 1879, served upon the plaintiffs a "notice stating that he proposed to lay a barrel or pipe drain "from his land along and under the bed of the burn, and to make "the necessary excavations for the purpose, ultimately restoring "the bed of the burn to its original level, except in certain parts "which he proposed to deepen." Before giving the notice, the defendant had already, without the plaintiffs' leave or knowledge, entered upon the plaintiffs' land and started to carry out excavations, but as the defendant still intended to proceed in this way the plaintiffs issued a writ and moved for an injunction "to "restrain the defendant from committing any further acts of "trespass or waste upon the plaintiffs' land, and from further "interfering with the burn except pursuant to any order of the "court for restoring the same, and from taking any proceedings "whatever before the justices of the peace under his notice"—that was the notice that he had given under the Land Drainage Act—"or at all events until he should have restored the burn "pursuant to any order of the court." There was a question of whether the notices were in proper form, about which I need not trouble, and there was some debate as to whether the justices would have jurisdiction to entertain any application to them under the Act having regard to the form in which the notices were framed. Sir George Jessel said[7]: "In the first place it "must be remembered that one of the main objects of the "Judicature Act was to enable the court to decide, if possible in "one proceeding, all the questions in dispute between the same

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[6] (1880) 13 Ch.D. 498, 499.

[7] Ibid. 501.

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"parties relating to the same matters (Judicature Act, 1873, "s. 24, subs. (7)); and that is a very important provision. Here "is a dispute for which an action has to be brought for trespass, "and a further, or second, dispute relating to the same piece of "land and to the same matter—the improvement of a drain—"and both disputes are between the same parties. If I can "properly decide the second question in dispute in this action, "it is, according to my view of the Judicature Acts, my duty to "do so. Can I then properly decide the question? The defen-"dant objects, in the first instance, to the jurisdiction: he says "that the magistrates themselves have the jurisdiction to decide "whether or not this is a proper notice. Now I will take it both "ways: in the first place I will assume they have jurisdiction. "There is nothing in the Act of Parliament to say that though "the magistrates may decide the question when it comes before "them, another court may not." I think that is all he says about the first question—that is assuming they have jurisdiction—and then he goes on[8]: "The magistrates' court being an inferior "court, any person served with a bad notice may apply for a "prohibition on the ground that there is no jurisdiction, and that "prohibition may now be granted by any judge of the High "Court. If I can grant a prohibition I can of course grant an "injunction between the parties." Then he went on, in effect, to say that an injunction would be speedier and cheaper than proceedings by way of prohibition where it involved a question of the jurisdiction of the magistrates. He said of the choice of the two courses, prohibition or injunction,[9] "if I am to consider "which is the more just and convenient, I have no hesitation in "saying that it is both more just and more convenient that I "should decide subject to two appeals only,"—that is to the Court of Appeal and the House of Lords—"which I think are "amply sufficient for such a case as this. Therefore on that "ground I should decide that this court should exercise juris-"diction." In the case of proceedings taken before the magistrates, he pointed out that there would be a larger number of appeals which might have been taken.

In a later case, *Stannard* v. *Vestry of St. Giles, Camberwell*,[10] Sir George Jessel commented on what he had said in *Hedley* v. *Bates*,[11] saying[12]: "Where the legislature has pointed out a

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[8] 13 Ch.D. 498, 502.

[9] Ibid. 503.

[10] (1881) 20 Ch.D. 190, C.A.

[11] 13 Ch.D. 498.

[12] 20 Ch.D. 190, 196.

"mode of proceeding before a magistrate it is not, as a general "rule, for another court to interfere to stop that proceeding by "injunction. I refer to that more particularly because the case "of *Hedley* v. *Bates*,[13] which I decided when sitting at the Rolls, "was cited as an authority for the exercise of such a jurisdiction." Then he comments upon *Hedley* v. *Bates*.[13] I do not think I need read what follows immediately, but later he says [14]: "But the whole doctrine which I laid down (as I thought clearly) "in *Hedley* v. *Bates* [15] was dependent on the fact of the court "having a case to try within its undoubted jurisdiction, if I may "say so, over and above the question which the magistrates could "decide." I confess that I do not quite follow myself what Sir George Jessel meant when he said [16] "over and above the "question which the magistrates could decide." As I understand it, the principle is that if two courts are faced substantially with the same question, it is desirable to ensure that that question is debated in only one of those two courts if by that means justice can be done. It does not appear to me, with all respect to Sir George Jessel, that it would make any difference whether the problems which confronted one court are of a wider and more general nature than the problems which confronted the other court. I can see that, if you have two proceedings going on in court "A" and court "B," the proceedings in court "A" relating to a number of questions only one or some of which are the subject-matter of the proceedings in court "B," there would be a strong argument for saying that the convenient course is to allow the proceedings in court "A," which will dispose of the matter raised in the proceedings in court "B," to continue, rather than the proceedings in court "B." It is quite true that in the proceedings before the magistrates questions of fact would be involved which would not arise in the proceedings in the Chancery Division. The prosecution would have to establish, unless it were admitted, that the person prosecuted had in fact committed the offence in respect of which he was prosecuted. But the question of substance to be decided in both these cases is whether or not the use which was being made of the motor vessel *Viscountess* was in law one which involved compulsory pilotage. That is precisely the question raised on the originating summons. I do not anticipate that there would really be any issue of fact in the magistrates' court, although, of course, I cannot be sure of that, but the question of substance would be one of law whether or not the circumstances were such as to be struck at by section 11 or section 43 of the Pilotage Act, 1913. That, as I say, is precisely the question raised by the proceedings in the Chancery Division. It seems to me, in those circumstances, that this case comes within the principle to which I have referred and is one in which it would be proper to say that the criminal proceedings should not be proceeded with until the question of construction had been decided in the Chancery Division, the Chancery proceedings having been on foot before the criminal proceedings were instituted and, indeed, before the offence in respect of which the criminal proceedings were taken was committed.

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[13] 13 Ch.D. 498.

[14] 20 Ch.D. 190, 196.

[15] 13 Ch.D. 498.

[16] 20 Ch.D. 190, 197.

Mr. Naisby, who appears for the defendants, has contended that the case does not come within that principle on three grounds. He says, first, that the parties to the two sets of proceedings are not the same. In the Chancery Division the parties are Thames Launches Ltd. and Trinity House. In the criminal proceedings the parties are the person by whom the information is laid, that is to say, the complainant, and the master of the vessel. I do not think, with respect to Mr. Naisby, that there is really any substance in that point. It is not disputed that the complainant is promoting the prosecution in the course of his duties as an employee of Trinity House, and in so doing is acting as their agent, and the matter in respect of which the prosecution is brought is something which the master of the vessel did in the course of his employment by the plaintiff company. I think, looking at the reality of the situation, that the parties are the same in both sets of proceedings.

Then Mr. Naisby says that, in any case, Trinity House is not here as a person who is seeking to obtain a remedy in two different courts in respect of the same subject-matter, because in the Chancery proceedings it is not Trinity House which is seeking any relief at all—they are the defendants. In that connection he referred me to *Saull* v. *Browne*,[17] where Lord Cairns said [18]: " I should be unwilling to express any doubt that there " may be cases in which criminal proceedings instituted by a " party to a suit in this court are so identical with the civil pro- " ceedings as to induce this court to order that the same person

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[17] (1874) L.R. 10 Ch. 64.

[18] Ibid. 65.

"shall not at the same time pursue his remedy in this court and "pursue another remedy which ranges itself under the head of "criminal jurisdiction. No doubt there may be such a case, and "the authorities which have been referred to, when properly "understood, entirely come under the description which I have "given." The authorities referred to include *York Corporation* v. *Pilkington*,[19] to which I have made reference. Mr. Naisby says that the principle is that a man should not pursue a remedy in respect of the same matter in more than one court. In my judgment, the principle is rather wider than that. I think it is that no man should be allowed to institute proceedings in any court if the circumstances are such that to do so would really be vexatious. In my judgment, it is vexatious if somebody institutes proceedings to obtain relief in respect of a particular subject-matter where exactly the same issue is raised by his opponent in proceedings already instituted in another court in which he is not the plaintiff but the defendant. The following will illustrate what I mean. Supposing a question of construction were to arise upon a will in respect of which the High Court and the Palatine Court had concurrent jurisdiction. If one party affected by that question started proceedings in the High Court for its determination making another party defendant, in my opinion it would be grossly vexatious for that defendant subsequently to start proceedings in the Palatine Court raising precisely the same question. I do not think that the way in which the proceedings are constituted from the point of view of who is the plaintiff and who is the defendant can be the test to be applied.

Then Mr. Naisby says that there are questions which would arise before the magistrate which would not arise in the Chancery proceedings. As I have already mentioned, there may be questions of fact which may have to be brought before the magistrate which do not arise in the Chancery proceedings, which ask for declarations and do not relate to any particular event. But the substantial point in these proceedings is the same. In these circumstances, I think that the right course for me to take is to grant an injunction restraining the defendants from proceeding on the two summonses in the Thames Metropolitan Magistrates' Court until the final determination of the questions raised on the originating summons or until further order.

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[19] 2 Atk. 302.

1960

THAMES LAUNCHES LTD. *v.* TRINITY HOUSE CORPN. (DEPTFORD STROND).

The notice of motion also asks for further relief in a much wider form which I should not be prepared to grant, but I think that in the circumstances it would be right for me to grant the injunction I have mentioned.

Order accordingly. Costs to be costs in the originating summons. Leave to appeal if such leave were necessary.

Solicitors: *J. A. & H. E. Farnfield; Freshfields.*

V. A. M

1960 *Nov.* 16, 17.

Danckwerts J.

LITTLEWOODS MAIL ORDER STORES LTD. *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Stamp duty—Conveyance or transfer on sale—Exchange or conveyance on sale—Deed entitled " deed of exchange "—No evidence of preceding contract of sale—Whether lease is a " conveyance "—Lease by friendly society to company—Assignment of lease to an associated company—Whether beneficial interest in the property previously " conveyed " by a person not associated with the transferor or transferee—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch.* 1—*Finance Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 28), *s.* 42—*Finance Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 50.

In 1958, a friendly society owned certain freehold property subject to a lease for 99 years from June, 1947, at an annual rent of £23,444 in favour of company A. On December 8, 1958, the society granted to company A a lease of the property for 22 years, 10 days, at an annual rent of £6, which operated as a surrender of the 99-year lease. On December 9, company A assigned the 22-year, 10-day lease to company B which was a wholly-owned subsidiary of company A. On December 10, company B granted to company A an underlease of the property for 22 years at an annual rent of £42,450. On December 11, the society and company B executed a deed, called a deed of exchange, whereby company B assigned to the society the 22-year, 10-day lease, subject to and with the benefit of the 22-year underlease, and the society conveyed to company B the fee simple of the property, subject to and with the benefit of the 22-year, 10-day lease. On December 12, company B executed a deed guaranteeing the payment to the society by company A of the annual rent of £42,450 reserved by the 22-year underlease and charging its freehold reversion with payment thereof. On December 13, company A, by deed, indemnified the society against payment of stamp duty and penalties.

On appeal by company A against assessments to ad valorem stamp duty on (1) the deed of assignment dated December 9, on the ground that it was exempted from stamp duty by section 42 of the Finance Act, 1930,[1] and was not deprived of that exemption by section 50 of the Finance Act, 1938,[2] although it was admitted that the transactions were an arrangement; and (2) the deed of exchange dated December 11 on the ground that it should be assessed under the head of charge "exchange or excambion" and not "conveyance or "transfer on sale":—

Held, (1) that the lease dated December 8, 1958, was a "conveyance" (post, p. 227), so that, at the date of the assignment of December 9, 1958, of that lease by company A to company B, the beneficial interest in the property was previously "conveyed" by a person not associated with either company A or company B, within the meaning of section 50 of the Finance Act, 1938; and that the assignment of December 9, 1958, was not, therefore, exempted from stamp duty by virtue of section 42 of the Finance Act, 1930.

(2) That the deed of exchange on its face was a straightforward exchange, and, there being nothing which amounted to a preceding contract of sale between the society and company B or which suggested it was a sale, it was impossible to say that in reality it was not an exchange but a conveyance on sale (post, p. 228); the deed of exchange, accordingly, was liable to stamp duty of 10s. only.

Escoigne Properties Ltd. v. *Inland Revenue Commissioners* [1958] A.C. 549; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406, H.L. distinguished.

CASE STATED by the Commissioners of Inland Revenue.

The appellants, Littlewoods Mail Order Stores Ltd. ("Little-"woods"), appealed from assessment of stamp duty made on two out of six deeds relating to transactions in respect of the same property presented for adjudication under section 12 of the Stamp Act, 1891.

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[1] Finance Act, 1930, s. 42: "(1) "Stamp duty under the heading "'Conveyance or Transfer on Sale' "in the First Schedule to the Stamp "Act, 1891, shall not be chargeable "on an instrument to which this "section applies . . . (2) This section "applies to any instrument as "respects which it is shown to the "satisfaction of the Commissioners "of Inland Revenue—(*a*) that the "effect thereof is to convey or transfer "a beneficial interest in property "from one company with limited "liability to another such company; "and (*b*) that either—(i) one of the "companies is beneficial owner of not "less than ninety per cent. of the "issued share capital of the other "company . . ."

[2] Finance Act, 1938, s. 50: "(1) "Section 42 of the Finance Act, 1930 ". . . shall not apply to any in-"strument, unless it is shown to the "satisfaction of the Commissioners "of Inland Revenue that the instru-"ment was not executed in pursuance "of or in connection with an arrange-"ment whereunder—(*a*) the con-"sideration for the transfer or con-"veyance was to be provided directly "or indirectly by a person other than "a company which at the time of the "execution of the instrument was "associated with either the trans-"feror or the transferee; or (*b*) the "beneficial interest in the property "was previously conveyed or trans-"ferred directly or indirectly by such "a person as aforesaid."

The following facts were stated by the commissioners: In 1958, before the execution of the first of the six deeds, some trustees of a friendly society, the Independent Order of Odd Fellows (hereinafter called " Oddfellows ") were entitled to the fee simple of Jubilee House, Oxford Street, London, which had been let to Littlewoods for the term of 99 years from June 24, 1947, at an annual rent of £23,444. After the execution of these six deeds, Fork Manufacturing Co. Ltd. (hereinafter called " Fork "), a wholly-owned subsidiary of Littlewoods, had acquired the fee simple, the term of 99 years had been extinguished and Oddfellows were entitled to the payment of £42,444 per annum under a lease for 22 years from December 10, 1958, payable by Littlewoods but guaranteed by Fork and charged on its freehold reversion. The six deeds were as follows:

1. Monday, December 8, 1958. A lease by Oddfellows to Littlewoods of Jubilee House for 22 years and 10 days at a rent of £6 per annum, which operated as a surrender of the existing lease.

2. Tuesday, December 9, 1958. An assignment made between Littlewoods and Fork which, after reciting, " Whereas: (1) By " a lease dated the eighth day of December, 1958 and made " between [Oddfellows] of the one part and Littlewoods of " the other part . . . Jubilee House Oxford Street and factory " premises abutting Ramillies Place registered at the Land Regis- " try with absolute title under Title Numbers 276399 and 280914 " . . . were demised by [Oddfellows] to Littlewoods from the said " eighth day of December 1958 for the term of twenty-two years " and ten days subject (so far as then subsisting) to the leases or " tenancies then affecting the demised premises and except and " reserved as therein mentioned and subject also to the payment " of the yearly rent of £6 thereby reserved and to the covenants " agreements and conditions therein contained (2) Littlewoods is " the beneficial owner of the whole of the issued share capital of " Fork (3) Littlewoods has requested Fork to accept the transfer " to Fork of the property hereby assured in manner hereinafter " appearing which Fork has agreed to do," provided " that in " pursuance of the said agreement and in consideration of the " premises Littlewoods as beneficial owner hereby assigns unto " Fork all the premises comprised in or demised by the said " lease dated the eighth day of December 1958 hereinbefore mentioned to hold the same unto Fork for all the residue now

"unexpired of the said term of twenty-two years and ten days "granted by the said lease subject henceforth to the payment of "the annual rent of six pounds thereby reserved and to the cove- "nants agreements and conditions therein contained and on the "part of the lessee to be observed and performed."

3. Wednesday, December 10, 1958. An underlease by Fork to Littlewoods of Jubilee House for 22 years at a rent of £42,450 per annum.

4. Thursday, December 11, 1958. A deed described as a deed of exchange and made between Oddfellows and Fork, which recited the lease dated December 8, 1958, and continued: "(2) [Oddfellows] . . . are entitled to the premises comprised in "and demised by the lease for an estate in fee simple in reversion "expectant upon the determination of the term thereby granted "(3) By an assignment made the ninth day of December 1958 "between [Littlewoods] of the one part and [Fork] of the other "part the entirety of the premises comprised in and demised by "the lease were assigned to [Fork] for all the residue then "unexpired of the said term of twenty-two years and ten days "subject to the payment of the said yearly rent reserved by and "the performance and observance of the covenants on the part "of the lessees and conditions contained in the lease (4) By "an underlease (hereinafter referred to as 'the underlease') "made the tenth day of December 1958 between [Fork] of the "one part and [Littlewoods] of the other part the entirety of "the premises comprised in and demised by the lease were sub- "demised to [Littlewoods] for all the residue then unexpired of "the said term granted by the lease except the last ten days thereof "subject to the payment of the yearly rent of £42,450 and the "performance and observance of the covenants on the part of the "underlessees and conditions in the underlease reserved and "contained (5) [Fork] is entitled to the premises comprised in "and demised by the lease for all the residue of the term thereby "granted in reversion expectant upon the determination of the "term granted by the underlease (6) The parties hereto have "mutually agreed to exchange their said respective estates and "interests in the said property Now in pursuance of the said "agreement and for the considerations hereinafter mentioned and "divers other good and valuable considerations this deed witnes- "seth as follows:—1. In consideration of the assignment herein- "after made by [Fork] to [Oddfellows] [Oddfellows] as trustees

"hereby transfer to [Fork] all that the land and property comprised in the title above referred to subject to and with the "benefit of the lease but to the intent that any leasehold estate "of [Fork] comprised in Title No. LN 58308 of which [Fork] "is the registered proprietor shall merge and be extinguished in "the freehold estate hereby transferred to [Fork]

"2. In consideration of the transfer hereinbefore made by "[Oddfellows] to [Fork] [Fork] as beneficial owner hereby "assigns unto [Oddfellows] all those leasehold premises comprised in and demised by the lease to hold the same unto "[Oddfellows] for all the residue now unexpired of the term "granted by the lease subject henceforth to the payment of the "said yearly rent of £6 and the performance and observance of "the covenants on the part of the lessees and conditions in the "lease reserved and contained and subject also to but with the "benefit of the underlease." By clause 3 Oddfellows covenanted with Fork to pay the rent and observe the covenants and conditions contained in the lease dated December 8, 1958.

5. Friday, December 12, 1958. A deed of guarantee and legal charge between Fork and Oddfellows, by which deed Fork guaranteed payment to Oddfellows by Littlewoods of the rent reserved by the underlease and charged the freehold reversion with the payment.

6. Saturday,. December 13, 1958. A deed of indemnity between Littlewoods and Oddfellows whereby Oddfellows were indemnified against payment of stamp duty and penalties.

The commissioners, through the Controller of Stamps, asked the solicitors for Littlewoods to explain the circumstances attending the execution of the lease of December 8, 1958, and the considerations which prompted the landlords to grant this lease for an annual rent of only £6. The controller also requested to be furnished with a narrative statement of the events and negotiations leading up to the execution of the various documents in the adjudication, supported by the relative correspondence and any agreement entered into by the parties. It was stated by the solicitors to Littlewoods that no form of agreement other than the documents presented for adjudication was entered into by the parties.

With regard to the assignment of December 9, 1958, Littlewoods claimed that this was exempt from duty by reason of the provisions of section 42 of the Finance Act, 1930. There was furnished by their solicitors a copy of a statutory declaration sworn on December 18, 1958, by a partner in that firm. Paragraph 6 of the statutory declaration stated that the assignment of December 9, 1958, was not executed in pursuance of or in connection with such an arrangement as is described in section 50 of the Finance Act, 1938.

The commissioners were of opinion that the assignment by Littlewoods to Fork of December 9, 1958, conferred a substantial benefit on Fork, being made either for no consideration or for an inadequate consideration, and was a conveyance or transfer operating as a voluntary disposition falling within the provisions of section 74 of the Finance (1909–10) Act, 1910, and chargeable with ad valorem duty under that section. Assuming that the effect of the assignment was to convey or transfer a beneficial interest in property from one "associated" company with limited liability (namely, Littlewoods) to another such company (namely, Fork) within the terms of section 42 (2) (*a*) of the Finance Act, 1930, the commissioners were of opinion that such beneficial interest "was" within the meaning of section 50 of the Finance Act, 1938, "previously conveyed or transferred" by Oddfellows or their trustees who were "associated" neither with Littlewoods nor Fork; and, notwithstanding the statutory declaration, the commissioners were not satisfied that the assignment was not executed in pursuance of or in connection with an arrangement under which such beneficial interest was so previously conveyed or transferred. The commissioners were accordingly of opinion that the exemption claimed was not applicable.

So far as regards the instrument called a "deed of exchange" of December 11, 1958, the commissioners, having considered all the instruments submitted for adjudication and the facts disclosed in the correspondence, came to the conclusion, on the facts before them, that there had been a sale by Oddfellows of the freehold property in consideration of an annuity of £42,444 payable for 22 years, and that the conveyance of the freehold property contained in the instrument called a "deed of exchange" was a "conveyance or transfer on sale" within the meaning of and was chargeable under the provisions of section 56 (2) of the Stamp Act, 1891, and other relevant statutory provisions at the rate of £1 for every £50 on a consideration of £42,444 per annum for 20 years, viz., on £848,880, duty £16,978.

The commissioners assessed the duty on the six deeds as follows: (1) Lease dated December 8, 1958, by reference to the head of charge "Lease or Tack . . . (3) For any other definite "term . . ." in the First Schedule to the Stamp Act, 1891, ad valorem duty in respect of the rent of £6 per annum: 2s. (2) Assignment dated December 9, 1958. Ad valorem voluntary disposition duty under the provisions of section 74 of the Finance (1909–10) Act, 1910, on the estimated value £400,000 of the leasehold interest assigned: £8,000. (3) Underlease dated December 10, 1958. By reference to the before-mentioned head of charge "Lease or Tack . . . (3)," ad valorem duty in respect of the rent of £42,450 per annum: £849. (4) Deed of exchange dated December 11, 1958. As a conveyance on sale of the fee simple by reference to the head of charge "Conveyance or "Transfer on sale," and to section 56 (2) of the Stamp Act, 1891, ad valorem duty at the rate of £1 per £50 on £42,444 × 20: £16,978. (5) Guarantee dated December 12, 1958: 10s. (6) Deed of indemnity dated December 13, 1958: 10s.

No objection was taken by Littlewoods to the assessment of duty in respect of the deeds numbered 1, 3, 5, and 6 above, nor to the valuation of the property assigned by the assignment of December 9, 1958, at £400,000; but Littlewoods contended that the assignment of December 9, 1958, was exempt from stamp duty under the provisions of section 42 of the Finance Act, 1930, and that the deed described as a deed of exchange dated December 11, 1958, was liable to the duty of 10s. only, under the head of charge "Exchange or Excambion—Instruments effecting" in the First Schedule to the Stamp Act, 1891.

R. O. Wilberforce Q.C. and *K. B. Suenson-Taylor* for Littlewoods. It is admitted that there was a scheme which all these transactions were to carry out. It is not admitted that there was any contract to execute these documents. It is not material, however, whether or not there was such a contract. As regards the assignment of December 9, transfers to subsidiary companies are dealt with by section 42 of the Finance Act, 1930, and section 50 of the Finance Act, 1938, which amends section 42. Section 53 (4) of the Finance Act, 1930, provides that that Act is to be construed as one with the Stamp Act, 1891, and, therefore, the Finance Act, 1938, which amends it must also be construed with the Stamp Act, 1891. Littlewoods have to show that the beneficial interest in the property assigned on December 9 was not previously conveyed or transferred by Oddfellows, for, unless it can do that, the exemption from stamp duty will be excluded by section 50 of the Finance Act, 1938. It is necessary, to show this, to find out what was the property assigned; it was a term of years of 22 years and 10 days. There is no dispute that the beneficial interest in that property was transferred. The next question, therefore, is, was the beneficial interest in the term of years of 22 years and 10 days "conveyed or transferred" to Littlewoods by Oddfellows when the lease dated December 8 was executed? In the first place, the beneficial interest clearly was not transferred. "Transfer" is an inappropriate word to describe what takes place when a freeholder creates a term of years in favour of a lessee. Was the beneficial interest conveyed by Oddfellows on December 8? "To convey" means to carry over an existing item of property. It is not a word which, in its normal meaning, is appropriate to describe the creation of an estate in land. The word "convey" can, however, have a wider meaning depending on its context: see, e.g., Law of Property Act, 1925. It is necessary to look at the particular Act in which the word is used to see whether it has a narrow meaning or a comprehensive meaning in the context of that Act. In *In re Sanders' Settlement*[3] "convey" was given a narrow meaning not extending to the creation of an interest. Throughout the Stamp Act, 1891, a distinction is drawn between conveyances and transfers on the one hand and leases on the other. Section 54 gives some guidance as to what is contemplated as amounting to a conveyance in that Act, although it does not define conveyance. Section 62, which is in similar terms to section 54, deals with conveyances on sale. It is obvious that section 62 does not include leases, and, therefore, section 54 cannot include them either. There is some authority for saying that section 62 should be read reddendo singulo singulis so that "transferred" relates to "instrument" and "vested" relates to "decree or order": see *Kemp* v. *Inland Revenue Commissioners*.[4] That part of the decision was criticised in *G. H. R. Co. Ltd.* v. *Inland Revenue Commissioners*,[5] but it is not clear to what extent McNair J. in the latter case[6] differs from Phillimore J. in the former.[7] It is submitted that the reddendo singulo singulis construction is right. "Vested" is not a word which is appropriate to the creation of a lease. It is clear from sections 54 and 62, combined with the schedules to the Act, that those sections are not dealing with leases, which have their own group of sections beginning with section 75. Section 56 deals with conveyances on sale for a consideration consisting of periodical payments. If this section applies to leases, there is a conflict between the sections relating expressly to leases and section 56, for, on that hypothesis, a lease would be chargeable under both. The present case is not within the wording of section 50 (1) (*b*), because what took place on December 8 was not a conveyance or transfer but the grant of a lease. However wide a meaning the words "convey" can have in other contexts, it should not be given a wider meaning in section 50 of the Finance Act, 1938, than it has in the Stamp Act, 1891, where it does not include a lease. *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners* [8] is an example of the kind of case that section 50 of the Finance Act, 1938, was designed to cover.

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[3] [1896] 1 Ch. 480; 12 T.L.R. 232, C.A.

[4] [1905] 1 K.B. 581; 21 T.L.R. 168.

[5] [1943] K.B. 303; 59 T.L.R. 211; [1943] 1 All E.R. 424.

[6] [1943] K.B. 303.

[7] [1905] 1 K.B. 581.

As to the exchange dated December 11, the question is whether the transaction effected by the deed called a deed of exchange is an exchange or a conveyance on sale. Section 73 of the Stamp Act, 1891, does not apply to the present case, for it relates to money paid for equality on an exchange and there is no evidence, in the present case, that there was any inequality; and no money was paid for equality. The properties exchanged were, on the one hand, the fee simple subject to a lease for 22 years 10 days at £6 per annum, and, on the other hand, a leasehold interest of 22 years 10 days subject to and with the benefit of an underlease for 22 years at a rent of £42,450 per annum. It is wrong to say that the deed of December 11 was a conveyance on sale of a fee simple by Oddfellows to Fork in consideration for the payment of £42,450 per annum for 22 years. That view does not take into account the fact that before these transactions Oddfellows were entitled to a rent of £23,444 per annum for 99 years.

The fact that a certain result is achieved by four instruments instead of one is not a reason for not stamping each document according to its nature. Parties are at liberty to carry out a transaction in two stages rather than in one. If it can be said, looking at the instrument, that it is not properly described, that is a different matter. One cannot make a document a deed of exchange by calling it one, if it is not, in fact, a deed of exchange. The documents in the case show that the parties combined to carry out the arrangement covering all the six documents; but that does not help the court to decide the legal nature of each individual document. Even if, contrary to Littlewoods' submission, there were a contract to make the exchange, it would still be an exchange. The only thing which could prevent the deed from being an exchange would be the fact that there was some consideration for the freehold other than that disclosed in the deed itself. Even if an agreement by Fork to execute the deed of guarantee of December 12 was part of the consideration for the exchange, that would not prevent the deed from being an exchange. The principal obligation to pay the rent was Littlewoods, and the commissioners accepted that by stamping the deed of guarantee 10s. It is, therefore, a guarantee, and a promise at the time of the exchange that Fork would guarantee the payment of the rent by Littlewoods cannot prevent the deed being a deed of exchange. It is an exchange of a valuable reversion for a present rent.

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[8] [1958] A.C. 549; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406, H.L.

A sale is a sale for a price to be paid in money or money's worth. Those characteristics are not present in the present case. There are only two exceptions in the Stamp Act, 1891, to the requirement that for a sale there must be a price in money. Those exceptions are in regard to a sale for a consideration consisting of stock or marketable securities (section 55) and a sale for a consideration consisting of a debt (section 57). The £42,450 per annum is not the consideration for a sale. Fork did not agree to pay it. It merely transferred its leasehold interest to Oddfellows. The £42,450 per annum is not payable under the so-called deed of exchange but under the terms of the underlease. The only way in which Fork is concerned with the £42,450 per annum is as guarantor of its payment for which someone else is, ex hypothesi, primarily liable. The £42,450 per annum is the rent annexed to the reversion held by Fork prior to the execution of the deed and, as such, it passes with the reversion. It is not right to say that, when a reversion carrying a right to receive rent is assigned, the rent is part of the consideration: *Swayne* v. *Inland Revenue Commissioners.*[9]

Cormack's Trustees v. *Inland Revenue Commissioners*[10] provides some guidance as to what is an exchange. As in that case, so in the present case, it would be difficult to say which was the purchaser and which the vendor. The commissioners are trying to tax the substance of the transaction and are ignoring the form in which it is carried out; but the parties are entitled to carry out the transaction in a form which will attract the minimum amount of stamp duty: *Holmleigh Holdings Ltd.* v. *Inland Revenue Commissioners.*[11] If, however, it is correct to charge the substance of the transaction, this is not a sale for £42,450 per annum but a sale for £19,000 per annum, i.e., £42,450 less the £6 payable under the lease dated December 8 and less £23,444 previously received under the original lease.

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[9] [1899] 1 Q.B. 335; 15 T.L.R. 133.

[10] 1924 S.C. 819.

B. L. Bathurst Q.C. and *E. Blanshard Stamp* for the Crown. Before December 8, Oddfellows were freeholders of the property and Littlewoods had a lease at a rent of £23,444 per annum due to expire in 2046. After December 13, the freeholder was Fork, a wholly-owned subsidiary of Littlewoods, and all Oddfellows had was a term of 22 years 10 days at £6 per annum subject to an underlease for 22 years. The practical effect of the whole transaction was that at the end of it Oddfellows' interest in the property was an interest for 10 days at £6 per annum.

As to the assignment, it was clearly an assignment of the lease of December 8 by Littlewoods to Fork. It was a voluntary disposition inter vivos which, apart from the provisions of the Finance Act, 1930, and the Finance Act, 1938, would be chargeable to duty under section 74 (1) of the Finance (1909–10) Act, 1910. The question, therefore, is whether the assignment is or is not exempted from duty by section 42 (2) of the Finance Act, 1930, having regard to the restrictions in section 50 of the Finance Act, 1938. The assignment was part of an arrangement whereunder the beneficial interest in the property was previously conveyed or transferred by an independent third party; and the beneficial interest in it was previously conveyed or transferred by the lease granted by Oddfellows on December 8. Littlewoods admit that these six documents were part of an arrangement and concede that it is for them to show that section 50 of the Finance Act, 1938, does not apply. The words "conveyed or transferred" in section 50 must not be given a narrow construction based on what the words may mean in various sections of the Stamp Act. Littlewoods say that a lease is not a document which is apt to convey or transfer a beneficial interest in property directly or indirectly. That cannot be right having regard to the decision in *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners.*[12] It is clear that, under the general law, a lease is a species of conveyance—that a conveyance includes a lease:

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[11] (1958) 37 A.T.C. 406.

[12] [1958] A.C. 549.

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Credland v. *Potter*[13]; *Eastbourne Corporation* v. *Attorney-General*[14]; Blackstone's Commentaries, vol. 2, p. 317. Woodfall's Law of Landlord and Tenant, 25th ed., p. 2, says that a lease is a species of conveyance. The definition of conveyance in the Law of Property Act, 1925, is very wide, as is the definition in earlier legislation such as the Conveyancing Act, 1881: see section 2 (5). It is clear from *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners*[15] that the House of Lords considered that the words in section 50 of the Finance Act, 1938, were to be given a wide meaning. Therefore, the meaning should not be restricted to that given to " conveyance " in the Stamp Act, even if that Act does restrict the meaning of the word in the way in which Littlewoods contend for. Section 62 of the Stamp Act is not dealing with conveyances on sale. It refers to " every " instrument " whereby property is transferred, except a sale or mortgage. Littlewoods contend that that cannot include a lease, but the Crown submits that it does. It is true that the commissioners do not, in fact, levy stamp duty on leases under that section. That does not mean, however, that section 62 does not apply to leases because, where a deed is liable to duty under more than one section, the commissioners are entitled to charge under that section which is most beneficial to them. They do not charge leases under section 62 because it only imposes a nominal duty. Therefore, even under the Stamp Act, " conveyance " includes a lease.

The Crown seeks to equate the lease in the present case with the agreement in *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners.*[16] Neither of those documents were conveyances in the strict sense of the word. *Kemp* v. *Inland Revenue Commissioners*[17] and *G. H. R. Ltd.* v. *Inland Revenue Commissioners*[18] were not dealing with section 50 of the Finance Act, 1938. Whether the construction put upon section 62 of the Stamp Act in *Kemp's* case[19] was right or wrong, the construction of section 50 of the Finance Act, 1938, must be considered in the light of the *Escoigne Properties* case.[20] *In re Sanders' Settlement*[21] was a case under the Solicitors' Remuneration Act, 1881, and dealt with the grant of an easement; it is a very different case from the present.

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[13] (1874) L.R. 10 Ch. 8.

[14] [1904] A.C. 155; 20 T.L.R. 252, H.L.

[15] [1958] A.C. 549.

[16] Ibid.

[17] [1905] 1 K.B. 581.

[18] [1943] K.B. 303.

[19] [1905] 1 K.B. 581.

[20] [1958] A.C. 549.

[21] [1896] 1 Ch. 480.

As to the exchange, if a document comes within two categories chargeable with stamp duty the commissioners can elect to charge it to duty under the head which will yield the higher duty: *Speyer Bros.* v. *Inland Revenue Commissioners.*[22] It is the legal effect of the document and not merely the form of the instrument which decides the liability to stamp duty: *Wale* v. *Inland Revenue Commissioners*[23]; *Cohen and Moore* v. *Inland Revenue Commissioners.*[24] The considerations which apply to income tax cases are not the same as those which apply to stamp duty cases: *Kirkness* v. *John Hudson & Co. Ltd.*[25] Income tax cases are, therefore, of very little value in the present case.

All the elements of a sale are present in this document. Oddfellows are the vendors and Fork, or, alternatively, Littlewoods, are the purchasers. The property sold is the freehold. If Fork are the purchasers, the consideration is the transfer by Fork to Oddfellows of the right to receive £42,444 per annum, and section 56 (2) of the Stamp Act applies. If Littlewoods are the purchasers, the consideration is the obligation to pay the rent reserved by the underlease. The fact that the conveyance of the freehold was taken in the name of Fork does not prevent Littlewoods being the purchasers: see section 54 of the Stamp Act.

There is no reason why there should not be a sale and a conveyance on sale in consideration of a lease. Schedule I to the Stamp Act refers, under the head of charge "conveyance or "transfer on sale," to the "amount or value of the considera-"tion," which shows that that head is not necessarily dealing with sales for money only. It is, therefore, possible to have a conveyance or transfer on sale for a consideration other than money: see, e.g., sections 55 and 57 of the Stamp Act. In one sense, every sale is an exchange. It may be that the transaction in the present case is both an exchange and a sale. In that case, the commissioners are entitled to choose under which head they will assess the deed to duty. Section 56 (2) of the Stamp Act, which deals with conveyances on sale in consideration of periodical payments, is entirely unrestricted in its terms. Whenever there is a conveyance on sale for a consideration consisting of periodical payments, the document can be assessed to duty under section 56 whether the periodical payments arise under a covenant, a bond or a lease.

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[22] [1908] A.C. 92; 24 T.L.R. 257, H.L.

[23] (1879) 4 Ex.D. 270.

[24] [1933] 2 K.B. 126.

[25] [1955] A.C. 696, 710, 729; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345, H.L.

The question is whether this transaction was a sale. It is immaterial that it was described as an exchange in the deed. It is also immaterial, if such be the fact, that it was an exchange because, if it was also a sale, the commissioners can elect to assess it to duty as a sale rather than as an exchange. When one is dealing with stamp duty the normal conception of a sale as a transfer of property for money must be extended: *Oughtred* v. *Inland Revenue Commissioners*,[26] in which the whole object of the arrangement was that the reversionary interest should be bought for shares, and that was held to be a conveyance on sale. Similarly, in the present case, the whole object of the arrangement was that the freehold should be paid for with the lease. *Jopling* v. *Inland Revenue Commissioners* [27] is an illustration of the sort of transaction which comes within the provisions relating to conveyances on sale. There is an element of contract in the present case, as there was in *Lord Portman* v. *Inland Revenue Commissioners*,[28] because there was an arrangement to make the exchange. The lease of December 8 was created solely for the purpose of providing the consideration for the purchase of the freehold.

There is authority for the proposition that it is only possible to exchange real property for real property: *J. & P. Coats Ltd.* v. *Inland Revenue Commissioners* [29]; Blackstone's Commentaries, vol. 2, p. 322. It may be, therefore, that this transaction cannot be an exchange at all, since a lease is not real property.

R. O. Wilberforce Q.C. replied.

DANCKWERTS J. This is an appeal on a case stated by the Commissioners of Inland Revenue in pursuance of section 13 of the Stamp Act, 1891, and involves two points in regard to stamp duty which are in themselves quite distinct and dependent on different considerations, although they are both dependent ultimately on the Stamp Act, 1891, and they arise out of the same series of transactions.

In 1958, Jubilee House in Oxford Street was let to Littlewoods for a term of 99 years from June 24, 1947, at an annual rent of £23,444. The landlords were a friendly society, the Independent Order of Oddfellows. It appears that in 1958 the rent of £23,444 per year was less than the rent which might be obtained in respect of the property known as Jubilee House in Oxford Street. Apparently Oddfellows wished to get a higher rent, but were prepared to grant a shorter term in order to obtain the higher rent, and that would involve getting rid of the existing lease which had some 80 years to run at that time. That was, I think, the origin of the transactions which followed, and which were carried out by means of six documents dated December 8, 1958, and the following five days.

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[26] [1958] Ch. 678; [1958] 3 W.L.R. 64; [1958] 2 All E.R. 443, C.A.; [1960] A.C. 206; [1959] 3 W.L.R. 898; [1959] 3 All E.R. 623, H.L.

[27] [1940] 2 K.B. 282; 56 T.L.R. 877; [1940] 3 All E.R. 279.

[28] (1956) 35 A.T.C. 349.

[29] [1897] 1 Q.B. 778; 13 T.L.R. 548.

The object of the particular method which was adopted of carrying out the transaction was to save the payment of greater stamp duty and, as Harman L.J. pointed out in *Holmleigh Holdings Ltd.* v. *Inland Revenue Commissioners*,[1] there is nothing illegal in arranging your affairs and the documents which you execute to produce the result of reducing the amount of stamp duty which has to be paid.

[His Lordship referred to the six deeds and continued:] The documents were sent for adjudication and there is an appeal only in respect of two of the documents. Those two are the assignment of December 9, 1958, which assigned to Fork the 22 years and 10 days lease, and the deed that was described as a deed of exchange. On those two deeds assessments of stamp duty were made, being £8,000 in respect of the assignment and £16,978 in respect of the deed which was called a deed of exchange. The duty has been paid, subject to the appeal, by Littlewoods.

It should be said that it is clear from the correspondence which passed between the advisers of the various parties that there was no preceding contract at any time before the execution of these documents, although it is claimed that the parties were co-operating, and that their legal advisers were busily engaged in evolving an arrangement which would be found to diminish as far as possible the liability for stamp duty.

As regards the assignment of December 9, 1958, the matter depends not only on the Stamp Act, 1891. Under that Act the assignment would plainly have been a conveyance and would have attracted the appropriate duty, and what I have to consider is whether the claim of Littlewoods, that it is exempted by virtue of section 42 of the Finance Act, 1930, is correct. Section 42 of that Act provides: "(1) Stamp duty under the heading 'Conveyance "'or Transfer on Sale' in the First Schedule to the Stamp Act, '1891, shall not be chargeable on an instrument to which this

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[1] (1958) 37 A.T.C. 406.

"section applies." Subsection (2) provides: "This section "applies to any instrument as respects which it is shown to the "satisfaction of the Commissioners of Inland Revenue"—which means, of course, that the onus is on the person concerned—"(*a*) that the effect thereof is to convey or transfer a beneficial "interest in property from one company with limited liability to "another such company; and (*b*) that either—(i) one of the "companies is beneficial owner of not less than ninety per cent. "of the issued share capital of the other company." Subparagraph (ii) is not material to the present case.

The position was that Littlewoods owned the whole of the capital of Fork, although they were two companies. They came within the description contained in this section and, under the provision of the section, so far as it applies, would be exempted from the payment of stamp duty on the conveyance.

In 1938, however, another provision was introduced by section 50 of the Finance Act of that year, which provided by subsection (1) that: "Section 42 of the Finance Act, 1930 (which "relieves from stamp duty any instrument the effect whereof is "to convey or transfer a beneficial interest in property from one "associated company to another, in this section respectively "referred to as the 'transferor' and 'transferee') shall not apply "to any such instrument, unless it is shown to the satisfaction "of the Commissioners of Inland Revenue"—again the onus is on the person concerned in the instrument—"that the instrument was not executed in pursuance of or in connection with an "arrangement whereunder—(*a*) the consideration for the transfer "or conveyance was to be provided directly or indirectly by a "person other than a company which at the time of the execution of the instrument was associated with either the transferor "or the transferee." That person is referred to again in paragraph (*b*), which says: "the beneficial interest in the property "was previously conveyed or transferred directly or indirectly by "such a person as aforesaid." That was the person referred to in paragraph (*a*), which was a person other than a company which at the time of the execution of the instrument was associated with either the transferor or the transferee.

Oddfellows, when they granted the lease of 22 years and 10 days at a rent of £6 a year, were persons who were not associated with either the transferor or transferee, Littlewoods or Fork, and the real point which arises is this: can it be said that the lease which was granted by Oddfellows for 22 years and 10 days was the transfer or conveyance of a beneficial interest in the property? The property appears to be the property which was transferred by Littlewoods to Fork by the assignment of December 9, 1958. Therefore, can it be said, for the purposes of this case, that the granting of that lease by Oddfellows was a conveyance? It is obviously not a transfer but it is possible it may be a conveyance.

Mr. Wilberforce, for Littlewoods, pointed out that in the Schedule to the Stamp Act, a conveyance on sale and other sorts of conveyances are referred to in a different set of provisions from those relating to the grant of a lease, which appears under the term "Lease or Tack." He referred me to various other sections which bear on the matter in one way or another, the group beginning with section 54, which is headed "Conveyances "on Sale," and the group beginning with section 75, entitled "Leases." I do not think, however, that that is really conclusive in regard to the matter which I have to decide. I have to decide whether, in the context of these statutes, the term "conveyance" does not include the grant of a lease. The Finance Act, 1930, and the Finance Act, 1938, have probably got to be construed as one with the Stamp Act, 1891, but I do not know that that either is really conclusive on the matter. The real question is: what is the meaning of "conveyance"?

I have been referred to *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners.*[2] That seems to me to be a very different case from the present one, but the point of it, for the purpose of this case, is that the observations of the House of Lords do seem to indicate that a wide construction should be given to the meaning of section 50, which is the important section for the purposes of this document.

It is quite clear, from the various cases to which I have been referred, that the word "conveyance" sometimes is capable of including a lease and sometimes is not capable of including a lease, the word "conveyance" being used in the more limited sense of the transfer of real estate to some other person. However, it seems to me that there are cases, and statements in the books, which indicate that it is not improper to describe a lease as a conveyance and, therefore, a person who grants a lease may be said to have conveyed an estate or property.

In Blackstone's Commentaries, 18th ed., vol. 2, p. 317, Sir William Blackstone says: "A lease is properly a conveyance of

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[2] [1958] A.C. 549; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406, H.L.

"any lands or tenements (usually in consideration of rent or "other annual recompense), made for life, for years, or at will, "but always for a less time than the lessor hath in the premises." Then, of course, he says that, if the whole interest is granted, it is an assignment.

A lease was treated as being a conveyance in *Credland* v. *Potter*,[3] a case concerning the registration of a document, where Lord Cairns discussed the matter and, having considered the object of the statute and the cases to which it was intended to refer, came to the conclusion[4] that a lease was to be regarded as a conveyance.

On the whole, I have come to the conclusion that, for the purposes of the present case, a lease is a conveyance and a person who grants a lease is a conveying party. Consequently, the assignment of December 9, 1958, came within the provisions of section 50 of the Finance Act, 1938, and, accordingly, the exemption conferred by the Finance Act, 1930, did not apply to it. In that respect I think that the commissioners were right in their contentions and that the duty is the amount which was assessed, that is, £8,000.

The second point in this appeal is entirely different. It arises in regard to the document described as a deed of exchange dated December 11, 1958. [His Lordship referred to the deed and read paragraphs (1) and (2) of the operative parts and continued:] On the face of it, that was a perfectly straightforward exchange and nothing else. It is quite true it was an exchange of the freehold for a term of only 22 years and 10 days; but that term of 22 years and 10 days was a valuable property in that it carried with it the benefit of the underlease, and the rent payable under the underlease was £42,450 per year. There is no suggestion that the values were not equal. There is no provision for payment of a sum by way of equality of exchange, and there has not throughout been any suggestion that the value of the freehold, valuable as it was, and the value of the leasehold interest were not in the eyes of the parties of equal value.

I have been referred to various provisions of the Stamp Act through which it is not necessary for me to go in detail. The principal argument on behalf of the Crown was that this was a conveyance on sale and, as it was a conveyance on sale, the commissioners were entitled to choose whether to assess it as a conveyance on sale or as an exchange; and therefore, if it was both, it did not matter that it was not only a conveyance on sale but also an exchange. It was said also that it was not an exchange having regard to all the circumstances of the case, and was, in fact, a conveyance on sale and nothing else.

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[3] (1874) L.R. 10 Ch. 8.

[4] Ibid. 11.

I was referred to a number of cases which, however, seem to me to be very different. In *Escoigne's* case,[5] for instance, it was not a case of an exchange. There was a pre-existing contract of sale. In *Lord Portman* v. *Inland Revenue Commissioners* [6] it was perfectly plain that though the document was termed a deed of exchange, in fact it was the implementation of a number of sales and, in that case, I had no difficulty in reaching a conclusion that the document was properly chargeable as a conveyance on sale. In the same way, in *Oughtred* v. *Inland Revenue Commissioners*,[7] it was quite plain that there had been sales and that the ultimate document executed by the trustees of the settlement in that case was a completion. None of the facts in those cases seem to me to be fairly comparable with the present case. In the present case, there was no preceding contract of sale at all. I cannot find in the facts of this case anything amounting to a sale.

I have described what was the original object of the parties, and the series of documents by which the object was carried out, which were designed to produce the result of less stamp duty being payable than would otherwise have been the case. I see no reason for saying that the documents were other than what they purport to be on their face. It is plain that they were very carefully settled, and if one could point to an earlier contract of sale, there might have been a different result. It seems to me that in the present case there was no sale at all and, therefore, it is impossible to say that the deed was not an exchange, and that it really was a conveyance on sale.

That disposes of the matter except for one subsidiary point which was raised. It was said by the commissioners that one cannot have an exchange except of interests which are of the same character. There is the authority of Blackstone's Commentaries, 18th ed., vol. 2, pp. 322–323, in favour of that proposition, but I doubt whether that is the law at the present time. In *J. & P. Coats Ltd.* v. *Inland Revenue Commissioners*,[8] Wills J.

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[5] [1958] A.C. 549.

[6] (1956) 35 A.T.C. 349.

[7] [1958] Ch. 678; [1958] 3 W.L.R. 64; [1958] 2 All E.R. 443, C.A.; [1960] A.C. 206; [1959] 3 W.L.R. 898; [1959] 3 All E.R. 623, H.L.

[8] [1897] 1 Q.B. 778; 13 T.L.R. 548.

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suggested[9] that possibly that was the law, and that exchanges could only be made of freehold interests in land. That seems to me to be going beyond anything that Blackstone said; but, however it may be, I do not think that that is the law at the present time. In my opinion, the law has progressed beyond that state and there may, at the present time, be exchanges of many different interests. There may possibly be an exchange of one class of property for another class of property; and certainly there may be an exchange of an interest in land for a different interest in the same land, which may be greater or smaller. I do not think, therefore, that the subsidiary point, which, indeed, was not pressed upon me for decision, is one with which I need concern myself.

In the result, the document in question is not subject to ad valorem stamp duty, but is to be stamped with a 10s. stamp as an exchange.

Declaration that the assignment of December 9, 1958, *was liable to duty as assessed, and that the deed of exchange dated December* 11, 1958, *was liable to duty of* 10*s.*

Order that the surplus duty be returned to Littlewoods.

No order as to costs.

Solicitors: *Jaques & Co.; Solicitor of Inland Revenue.*

V. A. M.

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[9] [1897] 1 Q.B. 778, 784.

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Dec. 7, 8, 21.

Buckley J.

In re WYKES, DECD.

RIDDINGTON *v.* SPENCER AND OTHERS.

[1959 W. No. 2006.]

Charity—Imperfect trust provision—No exclusively charitable object—"Benevolent or welfare fund"—Bequest of fund as benevolent or welfare fund or for welfare purposes for benefit of employees of *company—Whether validated by Charitable Trusts (Validation) Act,* 1954 (2 & 3 *Eliz.* 2, *c.* 58), *ss.* 1 (1), 2 (1).

Statute—Construction—Title of Act—Long title—Irrelevant to construction of unambiguous section—Charitable Trusts (Validation) Act, 1954, *s.* 1 (1) (post, p. 242).

By section 1 (1) of the Charitable Trusts (Validation) Act, 1954: "In this Act, 'imperfect trust provision' means any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable."

By his will, a testator, who died in 1947, left his residuary estate to his executors on trust to apply the income thereof for his wife's upkeep and benefit during her life, and directed that, upon her decease, his residuary estate, after payment of certain legacies, should be divided into three parts, one of which parts was bequeathed to the directors of a company "to be used at their discretion as a benevolent or welfare fund or for welfare purposes for the sole benefit of the past, present and future employees of the company." The testator's wife died in 1954. It was conceded that, apart from the Charitable Trusts (Validation) Act, 1954, that gift was invalid:—

Held, that since the whole of the share in the testator's residuary estate bequeathed to the directors of the company could, consistently with the terms of the bequest, be applied for a charitable purpose, namely, the relief of poverty among the employees and ex-employees of the company, notwithstanding that it could also be used exclusively for purposes which were not charitable, the bequest constituted an "imperfect trust provision" within the meaning of section 1 (1) of the Act, even though it did not include by express reference some charitable purpose as well as other non-charitable purposes; and that the bequest was, therefore, validated by the Act.

In re Gillingham Bus Disaster Fund [1958] Ch. 300; [1957] 3 W.L.R. 1069; [1958] 1 All E.R. 37; [1959] Ch. 62; [1958] 3 W.L.R. 325; [1958] 2 All E.R. 749, C.A. and *In re Harpur's Will Trusts,* ante 38; [1960] 3 W.L.R. 607; [1960] 3 All E.R. 237 considered.

ADJOURNED SUMMONS.

By his will, dated March 10, 1944, the testator, Edward Wykes, appointed his wife, Sarah Ann Wykes, Cyril Robert Riddington and Harold William Watterson to be executors and trustees thereof and, having given certain legacies, left the residue of his estate on trust to his executors, the income thereof to be applied for his wife's upkeep and benefit as she might desire during her lifetime. Upon the decease of his wife, after giving a number of legacies, he directed, by clause 9, that the residue of his estate should be sold and the proceeds divided into three equal parts to be disposed of as follows: (a) one part to the trustees of the Church of Christ then meeting at Andrewes Street, Leicester, upon certain trusts; (b) one part to the Leicester District Committee of the Churches of Christ upon certain trusts and (c) "The remaining one part to the board of "directors of E. Wykes (Leicester) Ltd. to be used at their "discretion as a benevolent or welfare fund or for welfare pur"poses for the sole benefit of the past, present and future "employees of the company."

The testator died on March 20, 1947, and his wife died on April 25, 1954, leaving the residue of her estate to be divided between five named charities.

E. Wykes (Leicester) Ltd. was a private company incorporated in 1935 to take over the testator's business of elastic rubber thread coverers. In 1947, the capital of the company was £50,000. In 1946, the company instituted a superannuation scheme for the benefit of employees of the company who had not attained the age of 54½ years in the case of males and 49½ in the case of females when they became employees of the company. The annual pension payable from the normal retiring date for each completed year of service after entry into the scheme ranged from 8s. for an employee earning less than £130 a year to £10 for an employee earning over £750 a year. Some fourteen persons, who were employees of the company when the scheme came into operation on June 3, 1949, were excluded from the scheme through age, ill health or for some other innocent reason.

By an originating summons dated August 28, 1959, the court was asked to determine (inter alia) whether the bequest contained in clause 9 (c) of the testator's will (i) was a valid charitable bequest, or (ii) was originally invalid but was validated by the Charitable Trusts (Validation) Act, 1954, or (iii) was void for uncertainty or otherwise.

B. S. Tatham for the plaintiff, Cyril Robert Riddington, one of the trustees of the will.

A. P. McNabb for Francis Leslie Lees Spencer and Trevor Charles Lodge, who were interested in questions concerning the bequests in clause 9 (a) and (b) of the will.

J. W. M. Turner for Harold William Watterson, the secretary of the company. The gift in clause 9 (c) of the will is validated by the Charitable Trusts (Validation) Act, 1954. It is conceded that the gift infringes the rule against perpetuities and is, therefore, invalid unless it is a charitable trust. It is also conceded that, since the gift is one in favour of the employees and ex-employees of a particular company and is not confined to the relief of poverty, it is not, on the face of it, a charitable gift: *Vernon* v. *Inland Revenue Commissioners.*[1] The gift is, therefore, a disposition which apart from the Act is invalid under the law of England and Wales so that, if it is an imperfect trust provision, it is within the scope of section 2 (1) of the Act and the Act applies to it.

The Act has been considered in *Vernon* v. *Inland Revenue Commissioners*,[2] *In re Gillingham Bus Disaster Fund*[3] and *In re Harpur's Will Trusts.*[4] *Vernon* v. *Inland Revenue Commissioners*[5] and *In re Gillingham Bus Disaster Fund*,[6] in so far as they reflect a situation where trustees are bound to use property for, amongst other purposes, a non-charitable purpose, have no bearing on a provision such as clause 9 (c), where the trustees are not bound to use part of the fund for non-charitable purposes. In the *Gillingham* case[7] Harman J. expressed the view[8] that the definition of an imperfect trust provision in section 1 (1) of the Act required the disposition to contain an express reference to some charitable object. In *In re Harpur's Will Trusts*[9] Cross J. treated the view of Harman J. as binding on him. Since clause 9 (c) does not contain any express reference to any charitable object, the view adopted by Harman J. in the *Gillingham* case[10] and by Cross J. in *In re Harpur's Will Trusts*[11] may seem to render the Act inapplicable to this gift. However, even on the view favoured by Harman J. in the *Gillingham* case,[12] it is submitted that the gift in clause 9 (c) has within it a notion of charity so that the provision in clause 9 (c) is equivalent to a provision for " a fund for the relief of poverty or as a benevolent " or welfare fund " for the employees and ex-employees of the company: see *per* Lord Evershed M.R. in the *Gillingham* case.[13] If clause 9 (c) is read in that way, it comes within the narrower construction of an imperfect trust provision favoured by Harman

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[1] [1956] 1 W.L.R. 1169; [1956] 3 All E.R. 14.

[2] [1956] 1 W.L.R. 1169.

[3] [1958] Ch. 300; [1957] 3 W.L.R. 1069; [1958] 1 All E.R. 37; [1959] Ch. 62; [1958] 3 W.L.R. 325; [1958] 2 All E.R. 749, C.A.

[4] Ante 38; [1960] 3 W.L.R. 607; [1960] 3 All E.R. 237.

[5] [1956] 1 W.L.R. 1169.

[6] [1958] Ch. 300; [1959] Ch. 62.

[7] [1958] Ch. 300.

[8] Ibid. 306.

[9] Ante 38, 46.

[10] [1958] Ch. 300, 306.

[11] Ante 38, 46.

[12] [1958] Ch. 300, 306.

[13] [1959] Ch. 62, 75.

J. in the *Gillingham* case.[14] Alternatively, it is submitted that the true construction of the definition of an imperfect trust provision in section 1 (1) has not been decided in a way which is binding on the court, and that, therefore, it is open to the court to hold that no express reference to charity is necessary and that the provision in clause 9 (c) is an imperfect trust provision as it stands.

The majority decision of the Court of Appeal in the *Gillingham* case[15] and also the decision of Harman J.[16] were based on the construction of section 2 (3) of the Act and not on section 1 (1). Apart from the construction of section 2 (3), the only point decided in the *Gillingham* case[17] was that section 2 (3) did not apply, on the ground that it was impossible to sever the trust for "worthy causes" from the two preceding and admittedly non-charitable trusts and apply the Act to that trust alone. The view on the construction of section 1 (1) expressed by Harman J.[18] was obiter, since it was not necessary for him to decide whether a trust for "worthy causes" was an imperfect trust provision. Both Lord Evershed M.R.[19] and Romer L.J.[20] said that Harman J. had "held" that the gift for "worthy causes" was not an imperfect trust provision, and it is true that Harman J. did express a firm opinion to that effect. However, it cannot be said that Harman J. "held" that the gift for "worthy causes" was not an imperfect trust provision, because it was not necessary to his decision so to hold. It is submitted that everything said by Harman J., Lord Evershed M.R. and Romer L.J. in the *Gillingham* case[21] as to the construction of section 1 (1) of the Act was obiter.

In *In re Harpur's Will Trusts*[22] Cross J. said[23] that he must treat the view of Harman J. in the *Gillingham* case[24] as binding on him. The decision in *In re Harpur's Will Trusts*,[25] however, turned on the question whether "purposes" in section 1 (1) of the Act included institutions; and the question whether an express reference to charity was necessary did not arise. Therefore, the view expressed by Cross J.[26] that the view of Harman J.

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[14] [1958] Ch. 300, 306.
[15] [1959] Ch. 62.
[16] [1958] Ch. 300.
[17] [1959] Ch. 62.
[18] [1958] Ch. 300, 306.
[19] [1959] Ch. 62, 72.
[20] Ibid. 77.
[21] [1958] Ch. 300, 306; [1959] Ch. 62, 75, 77.
[22] Ante 38.
[23] Ibid. 46.
[24] [1958] Ch. 300.
[25] Ante 38.
[26] Ibid. 46.

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in the *Gillingham* case[27] was binding on him was also obiter and, therefore, not binding on this court. The appeal which is pending in *In re Harpur's Will Trusts*[28] cannot affect the present case, for it relates solely to the question whether " purposes " includes institutions.

In the *Gillingham* case[29] Ormerod L.J., who delivered a dissenting judgment, was the only member of the court who had to decide the question of the construction of section 1 (1), and he decided[30] that it did not require any express reference to charity; his decision is fortified by the presence of the words " any provision " in the subsection.

A provision can be an imperfect trust provision within section 1 (1) notwithstanding that there is no express reference to charity in the provision. Alternatively, no express reference to charity is necessary, at any rate where the provision contains a notion of charity; and, because here the objects of the gift could include the relief of poverty, clause 9 (c) contains a notion of charity and, because the fund could be used exclusively for the relief of poverty, it is an imperfect trust provision and is validated by the Act.

C. M. G. Butterfield for the testator's next-of-kin. The judgment of Harman J. in the *Gillingham* case[31] is not in any way impaired by the fact that his decision was affirmed by the Court of Appeal on different grounds. The judgment of Harman J.[32] still stands; and that part of the judgment which deals with section 1 (1) was part of the ratio decidendi. Cross J. in *In re Harpur's Will Trusts*[33] clearly considered that it was part of the ratio decidendi and, therefore, binding on him. It is, therefore, submitted that it is binding on this court.

Assuming that the *Gillingham* case[34] and *In re Harpur's Will Trusts*[35] are not so binding, it is right and proper to look at the intention of the Act in order to construe it. Harman J. in the *Gillingham* case[36] was correct when he considered the long title to the Act not to restrict or extend the words used but as a key to their meaning. It is clear from the long title that the Act was not intended to extend the law of charitable trusts. It was intended to deal with cases such as those coming within the mischief of the decisions in *In re Diplock*[37] and *Ellis* v. *Inland Revenue Commissioners*.[38] It was intended to apply only to dispositions where there was a charitable object named in the gift which also included objects which were not strictly charitable. The Act was intended to preserve the charitable part of such gifts and not to validate provisions which were defective because, through lazy draftsmanship, the words used were too vague to be charitable. The long title to the Act clearly supports this view of the intention of the Act. If the Act does not require an express reference to charity, it follows that a phrase such as "for such "purposes as my trustees think fit" would be validated. In fact, on that hypothesis, the vaguer the words the easier would it be to say that they were validated by the Act. That cannot have been the intention of the legislature.

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[27] [1958] Ch. 300, 306.
[28] Ante 38.
[29] [1959] Ch. 62.
[30] Ibid. 80.
[31] [1958] Ch. 300.
[32] Ibid. 303.
[33] Ante 38, 46.
[34] [1958] Ch. 300; [1959] Ch. 62.
[35] Ante 38.
[36] [1958] Ch. 300, 305, 306.

It is not enough in the present case to say that a provision may be an imperfect trust provision despite the fact that there is no express reference to charity, for a general reference to "charitable purposes" would not make the present gift charitable: *In re Cox, decd.*[39] If this gift is to be charitable, it must be restricted to the relief of poverty: *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[40] Therefore, if the gift is to be validated, it is necessary to say that a provision may be an imperfect trust provision notwithstanding that there is no express reference in it, not to charity generally, but to a particular branch of charity, namely, the relief of poverty. This goes far beyond anything that was suggested in argument in the *Gillingham* case.[41]

There are no objects of this gift if it is restricted to the relief of poverty. There is no evidence to show that any of the beneficiaries are necessitous. Therefore, there is no possible beneficiary to take under clause 9 (c), and for that reason alone the gift fails.

B. J. H. Clauson for the Attorney-General. Although the Attorney-General is vitally interested in the interpretation of the Charitable Trusts (Validation) Act, 1954, he does not think it right to address any argument to the court in this case, as, whatever the decision may be, the fund will go to charity. If the gift is validated, the fund will go to a charitable trust for the employees and ex-employees of the company, and, if the gift fails, the fund will go to the charities entitled under the will of the testator's widow.

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[37] [1940] Ch. 988; 56 T.L.R. 961; [1940] 3 All E.R. 538; [1941] Ch. 253; 57 T.L.R. 263; [1941] 1 All E.R. 193, C.A.; sub nom. *Chichester Diocesan Fund and Board of Finance (Incorp.)* v. *Simpson* [1944] A.C. 341; 60 T.L.R. 492; [1944] 2 All E.R. 60, H.L.

[38] (1949) 31 T.C. 178, C.A.

[39] [1955] A.C. 627; [1955] 3 W.L.R. 42; [1955] 2 All E.R. 550, H.L.

[40] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31, H.L.

[41] [1958] Ch. 300, 303; [1959] Ch. 62, 65.

Cur. adv. vult.

Dec. 21, 1960. BUCKLEY J. I have to decide whether a bequest contained in clause 9 (c) of the testator's will is validated by the Charitable Trusts (Validation) Act, 1954. Having given his widow, who died on April 25, 1954, a life interest in his residuary estate, the testator bequeathed a number of reversionary pecuniary legacies to be paid on her death, and directed that the residue of his estate should be divided into three equal parts, with the bequests of two of which I have already dealt. Clause 9 (c) of the will is in the following terms: "The remaining one "part to the board of directors of E. Wykes (Leicester) Limited "to be used at their discretion as a benevolent or welfare fund "or for welfare purposes for the sole benefit of the past, present and future employees of the company. I declare that my "executors are empowered to accept the receipt of the then "acting secretary in full discharge of the amount due."

The value of the share of residue disposed of by this clause is of the order of £800. E. Wykes (Leicester) Ltd. (which I will call "the company") carries on the business of elastic rubber thread coverers, and is said to be prosperous. It at present employs 150 persons, and there are some 50 former employees alive. In 1946, the company instituted a superannuation scheme for its employees, but a number of employees were excluded from it when the scheme was set up. Some fourteen of these persons are still alive.

The present directors of the company are the third and fifth defendants. The fifth defendant, as one of the persons entitled to share in any property as to which the testator died intestate, has an adverse personal interest, and, accordingly, the argument in support of the trust has been presented by Mr. Turner appearing for the third defendant.

Mr. Turner very properly concedes that the bequest contained in clause 9 (c) is void unless it is validated by the Act, as he contends that it is. The bequest, being one which, apart from the Act, is invalid but would be valid if the objects for which this fund is directed to be held or applied were exclusively charitable, is a disposition to which, by virtue of section 2

(1), the Act applies, if the bequest constitutes an "imperfect "trust provision" as defined by section 1 (1) of the Act. If the bequest is such an "imperfect trust provision," then, since it is contained in an instrument which took effect before December 16, 1952, the Act validates the trust by the operation of section 1 (2).

Section 1 (1) of the Act defines an "imperfect trust provi-"sion" as follows: "In this Act, 'imperfect trust provision' "means any provision declaring the objects for which property "is to be held or applied, and so describing those objects "that, consistently with the terms of the provision, the property "could be used exclusively for charitable purposes, but could "nevertheless be used for purposes which are not charitable."

I have, therefore, to consider whether clause 9 (c) of the will so declares the objects for which this share of the testator's residuary estate is to be held or applied that consistently therewith the property could be used exclusively for charitable purposes but could nevertheless be used for purposes which are not charitable. A trust for the benefit of employees of a particular company, unless it be for the relief of poverty, cannot be charitable in the eye of the law because such a trust lacks a sufficient element of public benefit (*Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[1]). On the other hand, a trust to relieve the poverty of employees of a particular company has been held to be charitable (*Gibson* v. *South American Stores (Gath & Chaves) Ltd.*[2]). The class of persons to be benefited under clause 9 (c) of the will is confined to past, present and future employees of the company. Consequently, the only application of the fund or its income for the benefit of members of this class which would be legally charitable would be of a kind calculated to relieve the poverty of the beneficiaries. The relief of poverty would, I think, certainly be one, if not the sole or primary, object of a benevolent or welfare fund, and clearly comes within the term "welfare purposes"; and it seems to me that, if clause 9 (c) were valid, the directors of the company could, consistently with its terms, apply the whole of this share of residue for relieving poverty amongst employees or former employees of the company. In other words, they could have applied it all for charitable purposes, notwithstanding that they might consistently with the terms of the clause have used it all for purposes which are not charitable.

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[1] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31, H.L.

[2] [1950] Ch. 177; 66 T.L.R. (Pt. 1) 83; [1949] 2 All E.R. 985, C.A.

This would seem to demonstrate that this is an "imperfect "trust provision" within the meaning of the Act. It is said, however, that it has been decided, in authorities binding upon me, that an "imperfect trust provision" must declare the objects of the trust in such a form as to include by express reference some legally charitable purpose as well as other non-charitable purposes. An example of objects so declared would be "charitable or benevolent objects." If this be so, clause 9 (c) cannot be an "imperfect trust provision" within the meaning of the Act, for it is impossible to point to any purpose mentioned in this sub-clause which is of an exclusively charitable character. I must, therefore, consider the relevant cases.

In re Gillingham Bus Disaster Fund [3] related to money contributed by the public after a tragic street accident in response to an appeal for a memorial fund "to be devoted, among "other things, to defraying the funeral expenses, caring for the "boys who may be disabled, and then to such worthy cause or "causes in memory of the boys who lost their lives, as the "Mayors may determine." It was held that the words "among other things" did not confer a general discretion upon the trustees. The appeal contemplated three objects, and the word "then" indicated that it was only after the first two, namely, paying funeral expenses and caring for the disabled, had been satisfied that anything was to be applied to worthy causes. It was conceded that the first two objects lacked a sufficient element of public benefit to be charitable. Accordingly, if the whole trust had to be considered together it could not constitute an "imperfect trust provision" because the fund could not be used exclusively for charitable purposes. The argument presented on behalf of the Attorney-General was based upon section 2 (3) of the Act which, it was contended, required the court to apply the Act to the trust for worthy causes as though there were a separate disposition on trust for such worthy causes as the Mayors should determine of the surplus moneys not required for the first two purposes. Harman J. held that section 2 (3) was not applicable, and that, accordingly, there was no "imperfect trust provision." In the course of his judgment, however, the judge, after stating, in effect, that the argument was that the Act should be applied to the trust for worthy causes as though there were a separate disposition for that purpose, and that this trust satisfied the terms of section 1 (1) because all the money applicable for worthy causes might be applied to charitable purposes, said[4]: "This is a very far-"reaching submission. If it be right, a bequest 'for such objects "'as my trustees think fit' will be validated although nothing "whatever about charity is mentioned in the will. The vaguer "the words are, the better they will do. In my judgment, the "Act was not intended to produce any such result. It was, as "the long title shows, intended to cure dispositions whereby "part of the trust fund is devoted to charitable purposes and "part to purposes not charitable, or not wholly charitable, so long "as the whole of the money could be devoted to charity by excluding "ing words which were too wide or too vague." That observation was not germane to the judge's decision that section 2 (3) could not be called in aid in that case; nor was it, I think, an alternative ground of decision. It was, in my view, obiter dictum. Nevertheless, I should naturally wish to pay great attention to it. Before discussing it, however, I should mention the course the case took in the Court of Appeal.[5] The Master of the Rolls, having reached the conclusion that section 2 (3) was not applicable, declined to express a view upon the construction of section 1 (1). He said[6]: "It is accordingly unnecessary for me to "express a view of my own upon the second question, whether "the phrase 'to such worthy cause or causes,' etc., is itself "capable of constituting an imperfect trust provision. I feel, "as did the judge, considerable difficulty that a formula so "vague and wide as 'for such purposes as the trustees think "'fit' could have been within the contemplation of the Act "merely because such a formula would on the face of it allow the "exclusive selection of charitable purposes. But the phrase in "the present case is 'to such worthy cause or causes in memory "'of the boys who lost their lives . . .' and I feel also the force "of Mr. Buckley's argument that such a phrase has within it "at least the notion of charitable objects or objects analogous "thereto: and that the sense of the phrase would not be "materially different if it had run: 'to such *charitable or* other "'worthy causes,' etc. In the circumstances, therefore, I prefer "to express no view of my own upon this part of the Attorney-"General's case." Romer L.J. also held that section 2 (3) was not applicable and concluded his judgment[7]: "it therefore "becomes unnecessary to consider whether a gift for 'worthy "'causes,' in the context of the 'Daily Telegraph' letter, could "properly be regarded as a disposition in favour of 'an imperfect "'trust provision.' The judge held that it could not and there "appear to be powerful considerations which support his view. "It may be that an 'imperfect trust provision' under section "1 (1) of the Act is confined to cases where, among the declared "objects for which property is to be held or applied, one at least "is charitable; and that, accordingly, whilst a gift to 'charitable "'or benevolent' objects would be within the Act, a gift to "'philanthropic or benevolent' objects would not. It is not "necessary, however, to express any concluded opinion upon the "point, and I refrain from doing so." Ormerod L.J., on the other hand, held[8] that section 2 (3) did apply. It was, therefore, necessary for him to consider whether the trust for "worthy "causes" complied with section 1 (1). In his view the language of that subsection was unambiguous, and he could see no reason why the trust for "worthy causes" did not come within it, since the money applicable for that purpose, although it could be used exclusively for purposes which were not charitable, could be used exclusively for charitable purposes consistently with the terms of the trust. Both the Master of the Rolls[9] and Romer L.J.[10] referred to Harman J. having "held" that the trust for "worthy causes" could not constitute an "imperfect "trust provision" within section 1 (1). If by this they intended to say (as I do not think they did) that this formed part of the ratio decidendi of the decision of Harman J., I would with the utmost deference differ from them in this respect, as I conceive that I am entitled to do.

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[3] [1958] Ch. 300; [1957] 3 W.L.R. 1069; [1958] 1 All E.R. 37; [1959] Ch. 62; [1958] 3 W.L.R. 325; [1958] 2 All E.R. 749, C.A.

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[4] [1958] Ch. 300, 306.

[5] [1959] Ch. 62.

[6] Ibid. 75.

I will return to consider *In re Gillingham Bus Disaster Fund*[11] further after mentioning the more recent decision of Cross J. in *In re Harpur's Will Trusts.*[12] The testatrix in that case directed her trustees, stating it shortly, to divide her residue between such institutions having for their main object the assistance and care of wounded and incapacitated members of the armed forces in such manner and proportion as they should determine. The judge held that not all such institutions would necessarily be charitable; some would and some would not. In his view, the gift was equivalent to a gift for distribution amongst charitable or benevolent institutions, and he declined to accept a submission that the case should be decided on the ground that this was not so. So construed, unless a distinction ought to be drawn for the relevant purposes between a gift for charitable or benevolent institutions and one for charitable or benevolent purposes, it is clear that the bequest constituted an "imperfect "trust provision" whether the view of Harman J. of the construction of section 1 (1) was right or wrong, for the bequest as construed by Cross J. (except that it was a gift for institutions and not purposes) fell precisely within the narrower of the possible constructions of section 1 (1). Cross J. went on to hold that trusts for division amongst institutions, as opposed to trusts for the promotion of purposes, could not without violence to the language of section 1 (1) be brought within the Act. He accordingly held that the Act did not apply. Earlier in his judgment [13] the judge referred to *In re Gillingham Bus Disaster Fund* [14] and to the fact that in that case Harman J. had held that the Act applied only to a gift which was expressed to be for charitable purposes as well as for other non-charitable purposes. After referring shortly to the views expressed in the Court of Appeal in that case, Cross J. said [15]: "In these circumstances, I "must clearly treat the view of Harman J. on the point as "binding on me." For the reasons, however, which I have endeavoured to explain, the point did not arise for decision in *In re Harpur's Will Trusts*,[16] and it was, in my respectful opinion, irrelevant whether Cross J. considered the view of Harman J. as binding on him or not. In my view, Cross J. did not decide and, having regard to his interpretation of the bequest, could not have decided *In re Harpur's Will Trusts* [16] on this ground. If, however, what Cross J. said with regard to the *Gillingham* case [17] was an alternative ground for his decision, then, as it seems to me, what he was in effect saying was that, if his construction of the will was mistaken, then, since he would feel himself bound by what Harman J. had said, he would decide against the Attorney-General on that ground. Cross J. himself, in my view, did not decide that the view of Harman J. of section 1 (1) was correct.

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[7] [1959] Ch. 62, 76.

[8] Ibid. 79.

[9] Ibid. 72.

[10] Ibid. 77.

[11] [1958] Ch. 300; [1959] Ch. 62, C.A.

[12] Ante 38; [1960] 3 W.L.R. 607; [1960] 3 All E.R. 237.

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[13] Ante 38, 45.

[14] [1958] Ch. 300; [1959] Ch. 62, C.A.

[15] Ante 38, 46.

[16] Ante 38.

[17] [1958] Ch. 300; [1959] Ch. 62, C.A.

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The matter, therefore, stands thus. In the *Gillingham* case [18] Harman J. (as I understand him) said, obiter, that the Act should be construed as applying only to trusts framed in such terms that the objects referred to include some express reference to a charitable purpose but also include other non-charitable purposes (e.g., "for charitable or benevolent purposes"), and not as applying to purposes stated in a general way (e.g., "for public purposes") which could embrace charitable purposes but contain no express reference to charity or any charitable purpose. In the Court of Appeal in the *Gillingham* case [19] the majority decided the case on a ground which rendered this point irrelevant and, although they expressed some sympathy with the view of Harman J., abstained from expressing any opinion on the point, while the third and dissenting member of the court, to whose decision alone among the judgments I have mentioned the point was relevant, decided that section 1 (1) should not be construed in the restricted manner favoured by Harman J. but in accordance with its language, which he considered to be unambiguous.

In these circumstances, with deference to Cross J., I conceive I am at least free to adopt the view favoured by Ormerod L.J. if I think it preferable to the view favoured by Harman J.

It is well established that the language of a statute must primarily be construed according to its natural meaning. If the language is ambiguous the long title of the Act may be looked at to help resolve the ambiguity: it may not be looked at to modify the interpretation of plain language. The language of section 1 (1) of the Act is, in my judgment (as in the view of Ormerod L.J.), clear and unambiguous, and its operation cannot be in any way controlled by reference to the long title of the Act. Moreover, the long title does not, in my view, point the way in which Harman J. considered that it did. It refers to instruments "providing for property to be held or applied for objects partly "but not exclusively charitable." If it be conceded, as it must, that an expression such as "public purposes" embraces charitable as well as non-charitable purposes, that expression is, I consider, as aptly described by the language of the long title as the expression "charitable or other public purposes."

It is not surprising that legal minds should be startled by the idea that Parliament may have intended the language of section 1 (1) to have as wide a potential operation as its terms suggest. It

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[18] [1958] Ch. 300; [1959] Ch. 62, C.A.

[19] [1959] Ch. 62, C.A.

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must, however, be borne in mind (1) that the Act only applies to trusts contained in instruments which took effect some 19 months before the Act became law (see section 1 (2)), so that any trust which was palpably invalid would be likely to have been recognised as such before the Act was passed; (2) that section 3 preserved the right of anyone who might be concerned to assert the invalidity of a trust to do so within the times limited by that section, so that except in the case of a trust which, having been assumed to be valid, had been in operation since December 16, 1946 (which would not have been the case where the trust was palpably invalid), the rights of those concerned to assail its validity were not abrogated by the Act although a time-limit was put upon seeking to enforce them; (3) that the Act has no application to any trust the invalidity of which had been recognised and acted upon before December 16, 1952. (See section 2 (2).) Notwithstanding the wide language of section 1 (1), therefore, the Act was only calculated to validate trusts which were not palpably invalid or in respect of which those interested to assert invalidity had slept upon their rights.

It is also not surprising that it should occur to legal minds that one at least of the kinds of trust which the legislature had in mind to validate was the "charitable or benevolent" kind. Although this trap for charitably minded but unwary or uninstructed testators was well known to the profession at least since the time of the decision in *In re Macduff*,[20] and in fact from much earlier, the celebrated *Diplock* case,[21] reported on appeal to the House of Lords under the name *Chichester Diocesan Fund and Board of Finance (Incorp.)* v. *Simpson*,[22] made this aspect of charity law prominent in the minds of lawyers, and perhaps this may be particularly so of lawyers who were in practice in this branch of the law at and about the time of that decision. The same principle has been applied in other or somewhat more complicated circumstances in more recent cases, of which I may perhaps mention *Oxford Group* v. *Inland Revenue Commissioners*[23] and *Ellis* v. *Inland Revenue Commissioners*.[24] It does not follow, however, that this was the only form of defective quasi-charitable trust that the Act was intended to validate. From the year 1895, when Chitty J. decided *In re Foveaux*,[25] until that case was overruled in *Inland*

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[20] [1896] 2 Ch. 451.

[21] [1940] Ch. 988; 56 T.L.R. 961; [1940] 3 All E.R. 538; [1941] Ch. 253; 57 T.L.R. 263; [1941] 1 All E.R. 193, C.A.

[22] [1944] A.C. 341; 60 T.L.R. 492; [1944] 2 All E.R. 60, H.L.

[23] [1949] 2 All E.R. 537, C.A.

[24] (1949) 31 T.C. 178, C.A.

[25] [1895] 2 Ch. 501.

Revenue Commissioners v. *National Anti-Vivisection Society*,[26] the suppression of vivisection was believed to be a charitable purpose, although in the latter case this was held not to be so. There may well be other trusts in operation as charitable trusts at the present time which are similarly vulnerable. Why should it be supposed that the legislature did not intend the Act to apply to such trusts if within the ambit of their objects some charitable purpose can be found? Indeed, the Committee on the Law and Practice relating to Charitable Trusts (Command Paper 8710 of 1952), whose recommendations in this respect, be it said, were not precisely followed by Parliament, suggested legislation in the case of trusts which had been in operation for six years or more on the footing that they were valid charitable trusts, which, as the committee recognised, would have had the effect of validating them even if such trusts should in fact have no charitable object at all (see paragraph 503 of the committee's report). I mention this not, of course, for the purpose of construing the Act in the light of the report, but to demonstrate the danger of speculating about the intention of Parliament.

The intention of the legislature, like the intention of a testator, is primarily to be ascertained by reading the language employed, and it is not for this court to corset that intention, if it be clearly expressed, into some shape which accords better with the fashion of professional legal thought than the natural meaning of the language employed. More particularly, I think, this must be so when one is concerned with a definition section, where one must presume that Parliament would be specially precise and careful in its choice of language. The language of section 1 (1) is, in my view, clear and unambiguous. Construed in its natural sense it produces no absurdity or hardship. There appears to me to be no reason for thinking that so construed its effect exceeds what Parliament may reasonably be expected to have intended. I can discern no justification for declining to allow the language its full and natural effect. For these reasons, with respect to Harman L.J. (as he now is), I cannot agree with his view of the subsection as expressed in the *Gillingham* case,[27] which I think puts an unjustifiable gloss upon the language of the statute.

I return, therefore, to the language of section 1 (1) of the Act and inquire whether the will of the testator (which in this case both effects the relevant disposition and is the instrument which in clause 9 (c) contains the "imperfect trust provision" if there be one) describes the objects for which this share of residue is to be held or applied in such a way that consistently therewith the property could be used exclusively for charitable purposes, notwithstanding that admittedly it could be used for purposes which are not charitable. If the answer is affirmative, clause 9 (c) by definition constitutes an "imperfect trust provision." For the reasons indicated at the beginning of this judgment, I think the answer must be affirmative, with the consequence that, in my judgment, the Act applies in the present case.

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[26] [1946] K.B. 185; 62 T.L.R. 156; [1946] 1 All E.R. 205, C.A.; [1948] A.C. 31; 63 T.L.R. 424; [1947] 2 All E.R. 217, H.L.

[27] [1958] Ch. 300.

I will accordingly declare that on the true construction of the will and of the Charitable Trusts (Validation) Act, 1954, the bequest contained in clause 9 (c) of the will was originally invalid but has been validated by the Act in the manner provided by section 1 (2) thereof.

I should add that Mr. Butterfield suggested that the evidence established that there could be no objects of a trust ~~to~~ relieve poverty amongst past, present and future employees of the company, but I feel myself unable to reach this conclusion on the evidence.

I might also add that, just as in the *Gillingham* case [28] the Master of the Rolls discerned in the phrase "worthy causes" a notion of charity, so in the reference to a benevolent or welfare fund and to welfare purposes in the present case a notion or flavour of charity may be discerned. Members of the Bar are well acquainted with a charity in the name of which the word "benevolent" is prominent, and the Family Welfare Association is a very well-known charity which includes the word "welfare" in its name. I prefer, however, not to base my decision in any way upon this consideration, but upon the grounds which I have earlier elaborated.

Declaration accordingly.
Plaintiffs' costs on the trustee basis and defendants' costs on the common fund basis to be paid out of the residue of the testator's estate.

Solicitors: *Wilberforce, Allen & Bryant for Headley & Co., Leicester; Neale & Co. for Bray & Bray, Leicester; Treasury Solicitor.*

V. A. M.

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[28] [1959] Ch. 62, 75, C.A.

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Jan. 11, 12, 13.

Lord Evershed M.R., Upjohn and Pearson L.JJ.

In re COHEN, A BANKRUPT.

Ex parte THE BANKRUPT *v.* TRUSTEE OF THE PROPERTY OF THE BANKRUPT.

Ex parte TRUSTEE OF THE PROPERTY OF THE BANKRUPT *v.* THE BANKRUPT AND OTHERS.

[Leeds No. 22 of 1954.]

Bankruptcy — Salary or income — Life interest under settlement — Whether "income" of bankrupt—Vesting in trustee—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 51 (2).

Legal Aid—Costs—Security for costs—Appeal—Sum paid into court by solicitor of legally aided appellant—Appeal dismissed—Payment out to successful respondent—Principle applicable.

The bankrupt had been adjudicated bankrupt on November 4, 1954. At the date of his adjudication he was entitled under his father's will to a life interest in his father's residuary estate. Since the adjudication the whole of the income arising in respect of that life interest had been paid to his trustee in bankruptcy. The bankrupt applied by motion in the Leeds County Court for a declaration that his trustee was not entitled to receive the income from his father's residuary estate unless the trustee had obtained an order under section 51 of the Bankruptcy Act, 1914,[1] entitling him to receive it. The trustee by cross-motion sought a declaration that the income from such life interest was payable to the trustee and divisible amongst the creditors. The Divisional Court affirmed the order of the county court judge declaring that such life interest was vested in the trustee in bankruptcy and divisible among the creditors.

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[1] Bankruptcy Act, 1914, s. 51: "(1) Where a bankrupt is an officer "of the army or navy, or an officer "or clerk or otherwise employed or "engaged in the civil service of the "Crown, the trustee shall receive for "distribution amongst the creditors "so much of the bankrupt's pay or "salary as the court, on the application of the trustee, with the consent of the chief officer of the "department under which the pay or "salary is enjoyed, may direct. "Before making any order under this "subsection, the court shall communicate with the chief officer of the "department as to the amount, time, "and manner of the payment to the "trustee, and shall obtain the written "consent of the chief officer to the "terms of such payment. (2) Where "a bankrupt is in receipt of a salary "or income other than as aforesaid, "or is entitled to any half-pay, or "pension, or to any compensation "granted by the Treasury, the court, "on the application of the trustee, "shall from time to time make such "order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of "any part thereof, to the trustee, to "be applied by him in such manner "as the court may direct."

The bankrupt was a legally aided person. The Court of Appeal having refused to dispense with the lodgment of £20 as security for the costs of the appeal as required by the Bankruptcy Rule 129, that sum was paid into court by the bankrupt's solicitor out of his own moneys to enable the appeal to be set down. The Legal Aid and Advice Act, 1949, makes no provision for the payment of security for costs:—

Held, (1) that in subsection (2) of section 51 of the Bankruptcy Act, 1914, the word "income" in the phrase "salary or income" has a limited meaning, and that income from the life interest of the bankrupt under his father's will was not comprised in the term "income" in that subsection, and that the bankrupt's appeal from the declaration that the life interest had vested in his trustee in bankruptcy and was divisible among his creditors should be dismissed.

Ex parte Huggins (1882) 21 Ch.D. 85, C.A. and *Ex parte Benwell* (1884) 14 Q.B.D. 301, C.A. considered.

In re Landau [1934] Ch. 549; 50 T.L.R. 403, C.A. and *In re Tennant's Application* [1956] 1 W.L.R. 128, 874, C.A.; [1956] 1 All E.R. 425; [1956] 2 All E.R. 753, C.A. distinguished.

(2) That as a matter of principle, where a solicitor has paid into court a sum as security for the costs of the appeal of his client, a legally aided appellant, and the appeal is dismissed, the sum should not be paid out to the solicitor but, having regard to the exceptional nature of the case and the state of the authorities, half of the sum paid in should be repaid to the bankrupt's solicitor.

Decision of the Divisional Court (Danckwerts and Russell JJ.) affirmed.

APPEAL from the Divisional Court (Danckwerts and Russell JJ.).

The appellant, Louis Cohen, had been adjudicated bankrupt on November 4, 1954. At that date he was entitled under the will of his father, Barnet Cohen, who had died in 1935, to a life interest in his father's residuary estate. Ernest Freeman was appointed his trustee in bankruptcy. At the time of the adjudication the bankrupt's life interest was subject to a mortgage. On June 22, 1956, on the application of the trustee, the mortgage was set aside as a fraudulent preference and the income of the life interest, which had been accumulated after the adjudication, was paid to the trustee, and all the subsequent income had been paid to him.

The bankrupt applied in the Leeds County Court by motion for a declaration that his trustee had not any title to or right to receive the income of the residuary estate of the bankrupt's father, and that the bankrupt at all material times had been solely entitled to such income, an account of all moneys received by the trustee and an order that the trustee should repay all such moneys received by him to the bankrupt.

The trustee in bankruptcy by cross-motion applied for a declaration that the life interest of the bankrupt in the residuary estate of his father had vested in the trustee, and that all income which had accrued since June 22, 1956, or should arise during the life of the bankrupt or until sale of the life interest was payable to the trustee and divisible amongst the creditors of the bankrupt, alternatively, an order under section 51 (2) of the Bankruptcy Act, 1914, for the payment of the whole, or such part as might be just, of such income for the benefit of the bankrupt's creditors. The trustees of the father's will were respondents to the trustee's motion. They took no part in the proceedings and submitted to whatsoever order the court might make.

The two motions were heard together. The county court judge dismissed the bankrupt's motion. He allowed the cross-motion of the trustee in bankruptcy and declared that the life interest of the bankrupt had vested in his trustee, and that all the income which had arisen since the adjudication and the order of June 22, 1956, or which should arise during the life of the bankrupt or until sale of his life interest was payable to his trustee and divisible amongst the bankrupt's creditors.

The bankrupt appealed. His appeal was dismissed by the Divisional Court.

From that decision he appealed to the Court of Appeal. He was a legally aided litigant and he applied to the Court of Appeal to dispense with security. The Court of Appeal ordered security in the sum of £20. That sum was paid into court by the bankrupt's solicitor out of his own moneys.

Muir Hunter for the bankrupt, the appellant. This appeal raises the question of the rights of the trustee in bankruptcy in respect of the bankrupt's income from the realty and personalty to which he is entitled for life under his father's will. The rights of a trustee in a bankrupt's income have been considered by the courts on a number of occasions. The bankrupt's claim is that he is entitled to receive the income from his father's estate until the trustee obtains an order under section 51 (2) of the Bankruptcy Act, 1914, directing its payment in whole or in part to himself. The point of law raised by the appeal is whether this income has vested in the trustee for the benefit of the creditors. Section 18 of the Act vests the bankrupt's property in his trustee and section 38 defines the property which so vests. There are exceptions to the general rule that all of a bankrupt's property vests in his trustee. Section 50 contains some such exceptions, as did the repealed section 52. It is section 51 which is the vital section in this case. The section has been in approximately the same form since the Bankruptcy Act, 1869. Subsection (1) provides that where a bankrupt is an officer or in the civil service of the Crown his trustee shall receive such part of his pay or salary as the court may direct. Subsection (2) appears to contemplate that all of the bankrupt's " income " may not be distributed amongst his creditors. The Divisional Court took the view that there was some element of public policy to be extracted from the decisions on section 51 which was even to be implied in *In re Tennant's Application.*[2] There it was held that an annuity covenanted by deed to be paid by a husband to his divorced wife could not be sold by the trustee. The effect of that decision is that the annuity was held to have vested in the trustee in bankruptcy of the wife under sections 18 and 38 but that he was not entitled to deal with the income without an order of the court. [Reference was made to *Harrison* v. *Harrison.*[3]]

In the case of settled land, the legal estate remains in a bankrupt tenant for life, but under section 24 of the Settled Land Act, 1925, his statutory powers may on bankruptcy be exercised by the trustees of the settlement. It is open to the court under section 51 (2) to direct that all the bankrupt's income shall be received by his trustee and applied for the benefit of his creditors. The trustee then could sell the life interest.

The bankrupt's income under his father's will is within the general concept of income. For a payment to be income it must be an ascertainable annual amount and it must come from a fixed source. In *Ex parte Huggins*[4] it was held that a pension had vested in the bankrupt's trustee subject to the provisions of section 90 of the Act of 1869 (now section 51). In *Ex parte Benwell*[5] it was held that the court would not make any order in regard to the prospective and contingent earnings of a bankrupt bone-setter. The ground of that decision was that the bankrupt was not in receipt of any fixed income. [Reference was made to *In re Mirams.*[6]] *In re Shine*[7] was an exceptional case. The bankrupt was an actor and the question was whether his salary under a two-year contract was income within section 53 (2) of the Bankruptcy Act, 1883 (now section 51). Lord Esher M.R.

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[2] [1956] 1 W.L.R. 128, 874, C.A.; [1956] 1 All E.R. 425; [1956] 2 All E.R. 753, C.A.

[3] (1888) 13 P.D. 180.

[4] (1882) 21 Ch.D. 85, C.A.

[5] (1884) 14 Q.B.D. 301.

[6] [1891] 1 Q.B. 594.

[7] [1892] 1 Q.B. 522, 527; 8 T.L.R. 279, C.A.

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in that case said that "income" in the section meant "income "in the nature of salary." The authorities are not consistent and the earlier cases are difficult to reconcile with the later. [Reference was made to *In re Rogers*,[8] *In re Graydon*[9] and *In re Ward*.[10]] *Hollinshead* v. *Hazleton*[11] was concerned with the salary of a Member of Parliament and is not of assistance. It was there contended that such salary was wholly outside the Act. It was held in *In re Landau*[12] that the payments made to a wife under a maintenance agreement were not salary and did not vest in the wife's trustee in bankruptcy. *In re Garrett*[13] was the case of a police pension which under the Police Pensions Act, 1921, did not vest in the bankrupt's trustee. That was an example of a non-vesting type of property.

The fact that property vests in the trustee under the Act of 1914 is not conclusive. Section 51 (2) qualifies the trustee's rights. The question in this case is whether the bankrupt's interest under his father's will is "income" within section 51 (2). There is a body of authority which shows that "income" there means "income in the nature of salary." Income is a wider word than salary. It appears from the decisions in *Ex parte Huggins*,[14] *In re Landau*[15] and *In re Tennant*[16] that "income" does not mean income for all purposes. On the one side of the line are voluntary allowances; on the other side is income which is regular and periodic. Income which is derived under a settlement is income for the purposes of section 51 (2). The bankrupt's income in his case is in the nature of a salary.

Russell J. in his judgment pointed out that in *In re Forder*[17] it was assumed that an ordinary life interest automatically became payable to the bankrupt's trustee, and that was also assumed by section 33 of the Trustee Act, 1925. It must be pointed out that *In re Forder*[17] was not a decision in bankruptcy proceedings and the effect of section 51 (2) was not considered.

Douglas S. Forrester-Paton for the trustee in bankruptcy, the respondent. With regard to the decision in *In re Forder*,[17] it must be assumed that Parliament meant protective trusts in section 33 of the Trustee Act, 1925, to be effective and that they should be operative in case of bankruptcy. If the construction of section 51 (2) of the Act of 1914 for which the bankrupt contends is right, that intention would be defeated. The decisions on section 33 show that, immediately on a receiving order being made, a life interest subject to protective trusts is forfeited: *In re Forder*.[18] A life interest held on protective trusts is outside section 51 (2).

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[8] [1894] 1 Q.B. 425; 10 T.L.R. 24.

[9] [1896] 1 Q.B. 417; 12 T.L.R. 208.

[10] [1897] 1 Q.B. 266; 13 T.L.R. 166, C.A.

[11] [1916] 1 A.C. 428; 32 T.L.R. 177, H.L.

[12] [1934] Ch. 549; 50 T.L.R. 403, C.A.

[13] [1930] 2 Ch. 137; 46 T.L.R. 464.

[14] 21 Ch.D. 85, C.A.

[15] [1934] Ch. 549.

[16] [1956] 1 W.L.R. 128, 874.

[17] [1927] 2 Ch. 291, C.A.

The distinction between this case and the decisions in *In re Landau*[19] and *In re Tennant's Application*[20] lies in the difference of the circumstances in which the bankrupt became entitled. To ascertain the meaning of "income" in section 51 (2) it is necessary to apply the ejusdem generis rule. The genus by which the meaning of the word "income" is controlled consists of income having this common characteristic that it is income of which it would be undesirable or contrary to public policy that the bankrupt should be automatically deprived. Section 50 (1) deals with the stipends of a beneficed clergyman. Section 51 (1) deals with the pay or salary of officers and of civil servants. It seems that for the performance of their duties such bankrupts should not lose their pay or salary. The object of section 51 is to reconcile two principles of public policy: (1) that public officers must have the wherewithal to maintain their dignity; (2) that a man's creditors should be paid. Section 51 (2) deals with payments for services which have been rendered. While these payments are not limited to payments which at common law were inalienable, they are payments in the nature of salary. The maintenance paid to a woman is intended to be used for her maintenance. The court's inquiry should be directed to ascertaining the circumstances in which the annual payment was acquired. It would be absurd that if a man used his capital to purchase an annuity it should not be available for his creditors but that if he invested in stocks and shares they would be.

Where an employer has provided an annuity for a servant, that payment might fall into the same category as the maintenance of a wife. There have been a number of decisions on the maintenance of ex-wives. Such maintenance is precarious: *Hyman* v. *Hyman*.[21] The fact that maintenance is precarious was a point taken in *In re Landau*.[22] The first Bankruptcy Acts only applied to traders and no question arose as to settled life interests. "Property" is very widely defined. All the estate of the bankrupt both real and personal vests in the trustee.

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[18] [1927] 2 Ch. 291.

[19] [1934] Ch. 549.

[20] [1956] 1 W.L.R. 874, C.A.

[21] [1929] A.C. 601; 45 T.L.R. 444, H.L.

[22] [1934] Ch. 549.

The proper order in this case is to direct the trustees of the father's will to pay the income of the settled fund to the trustee in bankruptcy. If section 51 (2) applied to ordinary life interests arising under settlements, it would say so in terms. The income arising from invested property is not within section 51 at all. The wording of subsections (1) and (2) of section 51 is different. In subsection (1) the pay or salary the trustee receives is expressed to be for distribution amongst the bankrupt's creditors. Under subsection (2) annual sums ordered to be paid to the trustee are to be applied by him in such manner as the court may direct. The reason for the provisions of subsection (2) may be to enable the court to direct some payment to be made to the bankrupt.

If "income" includes the income of a trust fund, no provision is made for the case of a bankrupt tenant for life of settled land. "Salary or income" is not an apt description to cover rent. The framers of section 51 did not intend it to apply to ordinary life interests.

Muir Hunter in reply. The decisions on forfeiture of life interests on bankruptcy do not assist. All a bankrupt's property vests in his trustee, except property protected by statute, but there is a distinction between vested and payable. It is not payable to the trustee until an order has been obtained under section 51.

The question is what is the genus to which the "income" belongs. [Reference was made to Lord Parker's observations in *Hollinshead* v. *Hazleton*.[23]] It has been suggested that "income" in section 51 (2) is confined to income of which it was undesirable that the bankrupt should be deprived. The maintenance of an ex-wife is a case in point. Where the bankrupt is entitled to the income from settled shares, he does not own the source of the income. "Income" is a wider word than "salary." "Pension" in the section is not limited to public pensions. Some pensions can be commuted, but they are within the section. An annuity payable under a settlement is very like a pension. An annuity payable to a servant might be a pension. Why is not an annuity payable to a child a pension? Compensation for wrongful dismissal is within section 51 (2).

It is submitted that the court cannot make a "once-for-all" order under rule 277 of the Bankruptcy Rules, 1952. The court may order payment of the income to the trustee. It has a statutory jurisdiction under section 108 to review any order it makes. Since any order the court makes is liable to be revoked, the trustee in bankruptcy cannot sell a bankrupt's life interest.

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[23] [1916] 1 A.C. 428, 461, H.L.

In most of the reported cases the question has been whether the income in question was within the Act at all. "Income" does not apply to receipts of a fluctuating character. It does, however, include the income from a life interest.

LORD EVERSHED M.R. Like the judges in the court below, we feel that we should not render any assistance in this case by reserving judgment. As Danckwerts J. observed, he thought that the route through the jungle would not be further illuminated by consideration, and I venture to share that view, though I would say at once that the case is a difficult one, and rendered more difficult by decisions extending over nearly a century; and we have been much indebted to Mr. Muir Hunter for putting the point before us clearly, and referring us to many of these decisions on a point which has never in fact come in this form for decision before the court before.

The appellant, the bankrupt for whom Mr. Muir Hunter appears, enjoys under his father's will a life interest in his father's residuary estate. The estate is at the moment invested partly in real property, which has been let, and partly in shares in a building society, so that the income to which the bankrupt is entitled (subject to the bankruptcy) consists in part of the rent, less proper deductions, including presumably Schedule A tax, and in part of dividends on the shares.

It has been the contention of the bankrupt that that income is income vested, it may be, in the trustee, but which nonetheless the trustee cannot deal with in any way save by application under the terms of what is now section 51 (2) of the Bankruptcy Act, 1914.

It is desirable that I should read the substance of both that subsection and its predecessor. [His Lordship read section 51 (1) and (2) and continued:] It may be taken (and it has certainly been conceded in argument before us) that if a subject-matter is within the scope of subsection (2)—that is to say, if it is a salary or pension, by way of example—then albeit that the subject-matter vests in the trustee, the trustee's right or power to deal with the subject-matter is qualified or limited by the terms of subsection (2). It follows in the present case, if Mr. Muir Hunter is right, that the trustee in bankruptcy could not

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dispose of the life interest of the bankrupt; his only right and only power would be to make application to the court that the whole, or such part as the court might think fit, of this revenue or source of income should be applied by the trustee towards meeting the bankrupt's debts.

The problem resolves itself, for a reason which I hope to justify, to this short point: is this income, are these dividends and rents, income in the nature of salary—that is, income possessing the same or similar characteristics as salary? I fully accept, of course, that, in posing the question thus, I am assuming a premise, namely, that the word "income" has a limited significance in this subsection. That premise I hope to justify; but assuming it for the moment, then, for my part, I answer the question (and I answer it without hesitation, as did the judges in the court below) negatively: that is to say, in my view, the income here the subject of debate is not income of the kind I have mentioned, and therefore is not within the scope of section 51 (2).

I arrive at that conclusion as a matter of common sense and common use of language. Mr. Muir Hunter in his reply suggested that this income, these dividends and rents, could be regarded as truly analogous to a pension. I cannot accept that argument. As a matter of sense and of language, I do not think the income is so analogous. If that view is right, it is, of course, the conclusion of the case, and for my part I attempt no further definition of this phrase "income other than as aforesaid." I rest my conclusion on the significance of the word "income" which I derive from the cases.

The result (and particularly my unwillingness further to expand the meaning of this subsection) may perhaps be unfortunate; but I think it is, as the law has developed over the past century, inevitable. Certainly, so far as this case is concerned, I am, I confess, satisfied in my own mind that the answer which I have given is in accordance with the intention of Parliament in the legislation now before us.

There has been some discussion of the matter of public policy, the unruly horse referred to in Lord Parker's speech in one of the cases to which I shall later allude. I certainly prefer not to attempt any riding of that horse in this case; but if I look back over the history of this legislation, as we were invited and assisted to do by Mr. Forrester-Paton, I am much confirmed in the view I have formed that to hold otherwise than I do in this case would be to defeat the intention of Parliament; and, as I have mentioned public policy, to defeat also that element of public policy referred to by Lord Atkinson in the same House of Lords case, namely, that prima facie, if a man become bankrupt, his assets should be available for the discharge of his debts.

If you go back to the Bankruptcy and Insolvency Act of 1861 (the first Bankruptcy Act, we were told, to affect non-traders), you find there, as the clearest possible and inevitable conclusion, that a life interest actually enjoyed by a bankrupt is something which it would be the duty of the trustee in bankruptcy to realise for the benefit of the creditors. I need not take time in lengthy citation, but that view seems to me to flow beyond a peradventure from the terms of sections 115 and 127 of that Act. To illuminate it a little further, it was by section 115 that provision was made preventing a trustee from disposing of a life interest until it had fallen into possession. Section 127 laid down the duty of the trustee to realise the assets for the benefit of the creditors, and the Act itself makes it quite clear that the property of the debtor included property of every nature and kind. That Act contained in section 134 the ancestor of what is now section 51 (1). Though the language was not the same, it was directed to deal with the pay, half-pay, salary, etc., of persons in the service of the State; and it may well be that the subject-matters that section 134 dealt with were subject-matters which by common law were not assignable.

In 1869 the bankruptcy legislation was further amended and consolidated by the Bankruptcy Act, 1869, and there was then added to the successor of section 134, namely, section 89, what is the ancestor of section 51 (2), namely, section 90 providing for the case where the bankrupt is in receipt of a salary or income "other than as aforesaid," the language corresponding in other respects with what is now section 51 (2). But I note that in section 90 there is no such catalogue as is now in section 51 (2), that is to say, no reference to items such as half-pay, pension or compensation. The matter stood with the more general language, "salary or income other than as aforesaid." In the Bankruptcy Act, 1883, there is in section 53 language substantially corresponding to the present two subsections of section 51.

That is a brief sketch of the legislation, and I only add this, that the present sections of the Bankruptcy Act, 1914, relative to property vesting in the trustee, and so on, are in the widest possible terms, as were the corresponding terms in the earlier legislation; and it has been inherent in Mr. Muir Hunter's argument (and accepted, of course, by Mr. Forrester-Paton) that section 51 is not to be limited to cases in which the subject-matter—the salary or income—is a subject-matter not so vesting in the trustee.

Looking back over the history of the decided cases, it seems to me, if I may say so, that there has been some confusion on this head. When I come to the case of *In re Landau*,[1] which is of some importance, this court appears to have assumed that the subject-matter there before the court, namely, a maintenance award under an order of the Divorce Court, was not a subject-matter vesting in the trustee. It may be that (as a matter of historical interest) the special provision in section 134 of the Act of 1861 was intended to be and was effectively limited to the sort of subject-matter which, by common law, is inalienable. The addition in section 90 of the Bankruptcy Act, 1869, of the words "salary or income other than as aforesaid" clearly, I think, introduced by way of complement to what had gone before a subject-matter which was unlike the preceding subject-matter, in the sense that it covered subject-matter which would be alienable, and therefore prima facie would vest in the trustee.

I do not pursue that aspect of it, but I mention it because it may well be that the confusion, if such it be, which has arisen in this matter may in part arise from the consideration whether section 51 (2) and its predecessors was or was not originally intended to deal with something which, apart from the impact of that section, would not have vested in the trustee at all. I say, however, no more about the legislation. My reference to it, I hope, justifies what I have said, namely, that the conclusion I reach in this case appears to me plainly in accord with the intention of Parliament, so far as you can derive it from a consideration of the legislation during the past century.

I must, however, now come to justify that which I have described as the premise of my conclusion, namely, the view which I have taken of the meaning of the word "income" as we find it now in section 51 (2). I would add this in further support of my general view of the case—that I think a conclusion different from that which I reach would produce anomalies which might fairly be described as extravagant. There can be no doubt that if one, who owns income-producing property in the form of shares, real property, etc., went bankrupt, the trustee would be entitled and bound to realise the asset for the benefit of the creditors, and thereby, of course, to take from the bankrupt not only his right to the corpus, but his enjoyment of the income. It would seem strange that there should be so marked a distinction, from the point of view of the interest of creditors, between the case where a man owns the income-producing asset, and the case where, though he does not own that asset, he is entitled to a life interest therein. What on this view would be the situation if a man owned the asset subject to the possibility of it being divested, I know not.

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[1] [1934] Ch. 549; 50 T.L.R. 403, C.A.

Mr. Forrester-Paton referred in the course of his argument to *In re Forder*,[2] mentioned in the judgment of Russell J. I do not derive great assistance from consideration of that case; but this can, I think, be asserted: if the argument for the bankrupt is correct, then it would appear inevitably to follow that upon the bankruptcy of one who had an interest in property liable to forfeiture, the result would be likely to be quite different if the trusts on the one hand were expressed by reference to section 33 of the Trustee Act, 1925,—that is to say, if the will or settlement provided that the beneficiary should enjoy the income upon "protective trusts"—and on the other where the beneficiary took under a will or settlement, which set out at length the conditions upon which a forfeiture should arise, in language such as was in fact employed in the case of *Forder*.[2] Again I need not pursue it, but it would seem a strange result that there would be liable to be such fine distinctions producing such great differences.

But I must now turn to the cases. Very properly, Mr. Muir Hunter, in opening, referred to the considerable line of authorities which touches upon this matter, and I shall refer not to all, but to some of them. The proper starting-point inevitably is the case of *Ex parte Huggins*.[3] That was decided by this court in the year 1882, the relevant Bankruptcy Act, therefore, being that of 1869. It will be recalled from my earlier references that section 90 of that Act was the counterpart of section 51 (2), but it did not contain the references to pension and the like now found in the present subsection. Mr. Huggins was a man who had been Chief Justice of the colony of Sierra Leone, from which office he had retired on receiving a pension from or through the Colonial Office. He had then proceeded to engage in a bottle-washing business which, as a commercial venture, was disastrous;

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[2] [1927] 2 Ch. 291, C.A.

[3] (1882) 21 Ch.D. 85, C.A.

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and the question was whether the pension which he was receiving (and I emphasise that the word " pension " did not then appear in section 90 of the Act of 1869) was one to which the trustee in bankruptcy could resort to any extent for the purpose of payment of creditors. The argument on the bankrupt's behalf was that the pension was not assignable, and therefore was outside the scope of bankruptcy altogether. Sir George Jessel M.R. expressed some sympathy with the unfortunate ex-Chief Justice, who had not chosen, like the cobbler, to stick to his last. But he arrived at the conclusion that the pension did vest in the trustee, but that nonetheless it was within the ordinary sense of the formula " salary or income " in section 90. He used this language[4]: " The present appellant's income is not a 'salary,' " but it is 'income.' The word 'income' is as large a word as " can be used. It is not the less 'income,' because it has to be " voted every year by the Colonial Legislature."

The second member of the court was Lindley L.J., and he said this[5]: " Is this bankrupt 'in the receipt of a salary or income " 'other than as aforesaid'? "—quoting the language of section 90. " His pension is not a 'salary,' inasmuch as he is not bound " to render any services in respect of it. But why is it not " 'income'? Surely it is income in every sense of the word," and the Lord Justice proceeded to point out that it was not a mere voluntary allowance. That decision in 1882 upon its face, and in the light of the short citations I have made from the judgments, might quite fairly lead to the view that " income " meant income; that it was, as Sir George Jessel M.R. said, as large a word as could be used, with the result that " income " would include income of every kind, and so, inter alia, would cover the income with which the court is concerned in this case.

That it does not have so wide an effect became apparent two years later in 1884; but before I refer to the case of 1884 I shall go straight to another decision of this court rather more than 50 years later, the case of *In re Landau.*[6] It will have to be borne in mind that for the moment I have passed over the intervening cases which followed *Ex parte Huggins*[7] very closely, but the full significance which the passages I have read from *Ex parte Huggins*[7] might have, was, I think, first brought into play in this case of *Landau.*[8]

[4] 21 Ch.D. 85, 92.
[5] Ibid. 93, 94.
[6] [1934] Ch. 549, C.A.
[7] 21 Ch.D. 85, C.A.
[8] [1934] Ch. 549, C.A.

Landau [8] was a case in which a lady had divorced her husband, and had obtained from the Divorce Court an order (albeit by consent) for the payment of £1,800 tax free per annum by way of maintenance. She had then gone bankrupt. It was her contention—which had succeeded before the Registrar in Bankruptcy—that this maintenance was not available at all to the trustee in bankruptcy of the lady's creditors. Against that ruling the trustee in bankruptcy appealed. There is no note in the report of the arguments of counsel, but it seems to me quite plain from the judgments (and I hope I have not misapprehended them) that the court reached its conclusion upon the assumed basis that the subject-matter of this Divorce Court order was unassignable, and did not therefore vest in the trustee in bankruptcy.

Lord Hanworth M.R. referred to *Ex parte Huggins*,[9] and he referred particularly to the observations of Sir George Jessel M.R. All the members of the court came to the conclusion that, although the maintenance income was not vested in the trustee, nevertheless the trustee was entitled under section 51 to apply for an order that part of it should be available to the trustee for the discharge of the lady's debts. Slesser L.J. referred also to *Ex parte Huggins*,[9] and in particular to what Lindley L.J. had there said.

Romer L.J.—having affirmed the view, previously taken by Farwell J., that section 51 applied, whether the property was or was not vested in the trustee—then proceeded to consider the argument, which had been put forward on the bankrupt's behalf by Mr. Tindale-Davis, that this payment was not income. After referring to what Lord Esher M.R. had said in 1884 in *Ex parte Benwell* [10]—a case to which I have obliquely alluded, having followed *Ex parte Huggins* [11] by two years—Romer L.J. said [12]: "It "is true that Lord Esher in *Ex parte Benwell* [13] said that income "in the old section corresponding to section 51 (2), was income "ejusdem generis with salary; but, with all respect to that "learned judge, I do not think such a statement assists us very "much unless the statement goes on to tell us to what genus "the salary payment belongs. He did not do so, but in the same "case Cotton L.J. did, and in the passage read by the Master of "the Rolls the learned Lord Justice said: 'In my opinion section "'90 points to some definite annual amount which is coming to "'the bankrupt.'" The Lord Justice then said: "This £1,800

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[8] [1934] Ch. 549, C.A.
[9] 21 Ch.D. 85.
[10] (1884) 14 Q.B.D. 301.
[11] 21 Ch.D. 85.
[12] [1934] Ch. 549, 560, C.A.
[13] 14 Q.B.D. 301.

"a year, free of tax, without any question whatsoever is a definite "annual amount coming to the bankrupt." Adverting to what he had said a little earlier, Romer L.J. further said that he had not the least idea why this annual payment was not income within the meaning of the section.

The decision in that case has stood now for a quarter of a century. I am fully alive to the fact that it must bind this court, and indeed in the latest of the cases to which I desire to refer, *Tennant's Application*,[14] this court held itself so bound. Both my brother Upjohn at first instance and this court shared the view that if the matter were res integra, the case of *Tennant* [14] might well have been properly decided in the opposite way from the way in which it was in fact decided. But Upjohn J. and this court felt themselves bound by the decision in *Landau*,[15] and found it impossible to draw any sensible distinction between *Tennant's* case [16] and *Landau's* case.[17]

In *Tennant's* case [18] the bankrupt was again a lady who had divorced her husband, the only difference between that case and *Landau* [19] being that there had not been an order of the Divorce Court, the husband having by covenant agreed to pay an appropriate sum for maintenance. To have distinguished the two cases would have involved saying that there was some distinction between the income derived by an ex-wife under a deed of covenant and the income derived under a Divorce Court order made by consent. But I observe that, in delivering the leading judgment in that case, I did say this [20]: "I desire to emphasise that "I am confining my decision in this appeal to the facts of this "case and the questions raised in it. It was said by Mr. Jennings "that, if Upjohn J. was right, then the same result would follow "in the case, for example, of a person who is absolutely entitled "to income as life tenant under a settlement of some fund or to "an annuity under a testator's will. Those cases are not before "us, and I express no view upon them. Income of those kinds "may or may not be within section 51 (2)."

That case is now before us, and, as I have indicated, I think that the income with which we are now concerned is in quality different from the income which the ladies in *Landau's* case [21] and

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[14] [1956] 1 W.L.R. 128, 874, C.A.; [1956] 1 All E.R. 425; [1956] 2 All E.R. 753, C.A.

[15] [1934] Ch. 549.

[16] [1956] 1 W.L.R. 874, C.A.

[17] [1934] Ch. 549.

[18] [1956] 1 W.L.R. 874, C.A.

[19] [1934] Ch. 549.

[20] [1956] 1 W.L.R. 874, 882.

[21] [1934] Ch. 549.

Tennant's case [22] were receiving. The latter was income of the special kind that it was by way of maintenance following the dissolution of marriages. It follows from what I am saying that such maintenance can fairly as a matter of language be treated as having at any rate some of the essential characteristics of a salary but that the income with which we are now concerned cannot. The distinction may be thought to be fine, but it appears to me from the cases to which I am now coming that the line has to be drawn somewhere; and I prefer not to attempt any further definition, but to repeat that if *Tennant* [22] and *Landau* [23] are on one side of the line, then in my view, without any doubt, this case is on the other.

I have already said that I will avoid any attempt at equitation on the unruly horse of public policy; but there is at any rate something to be said on the line of public policy for dealing differently with a maintenance award or maintenance income of the kind involved in those two cases, and this kind of income. I make just one point here which appears from *Tennant's* case [24]: If the case of Mrs. Tennant (as she had been) was to be treated as outside section 51 (2), on the ground that the trustee could proceed to dispose of the covenanted income for the whole of her life, or whatever period may be appropriate, then, of course, there would appear to have been nothing to prevent her making an application in the Divorce Court for some further maintenance, and so the thing presumably would go on indefinitely. No considerations of that kind enter into this case.

It is now time that I retrace my steps to 1884, and refer to the case already mentioned by Romer L.J. in *Landau*,[25] namely, *Benwell*.[26] It was decided in 1884 after the passing of the Bankruptcy Act, 1883, but the Act which applied to the facts in that case was still the Act of 1869, the same Act which had been considered in *Ex parte Huggins*.[27]

Benwell [28] was a case of one whose profession was described in the case as that of a "bone-setter," one who might today be called an osteopath, but "bone-setter" was the term used in *Benwell*.[28] On the facts his income appeared to be somewhat precarious, and its amount very much in dispute. The question was whether what he earned from his professional activities was income within the meaning of section 90 of the Act

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[22] [1956] 1 W.L.R. 874.
[23] [1934] Ch. 549, C.A.
[24] [1956] 1 W.L.R. 874, C.A.
[25] [1934] Ch. 549, 560, C.A.
[26] 14 Q.B.D. 301.
[27] 21 Ch.D. 85.
[28] 14 Q.B.D. 301.

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of 1869. In so far as he earned it and received it, it would no doubt be income in his hands. Any professional man who earns fees pays tax upon what he earns on the footing that it is taxable income. This court, however, held that the future fees in question were not income within this broad formula by giving in its context to the words " income other than as aforesaid " the qualification I have already mentioned, that is, by limiting the word in section 90 to income in the nature of salary. That is made quite clear by Brett M.R., who had succeeded Sir George Jessel M.R. as Master of the Rolls. He said[29]: " What is the meaning of " the word ' salary ' in the section? It must be a salary of the " same kind as those things which have been already mentioned " —that is, of course, a reference to section 89—" though it is not " paid in respect of similar services. Then there is the general " word ' income.' The rule is that general words added to particular words do not include everything which would come within " them according to the literal meaning of the English language, " but are to be limited to things ejusdem generis with those things " which have been previously mentioned. ' Income,' therefore, " must mean ' income ' in the nature of a ' salary.' "

Cotton L.J. similarly so limits it. He says this[30]: " In the " cases provided for by section 88 the bankrupt has a right, if " things go on as they are, to receive a specific sum every year, " and then a part of that sum can be set aside and paid to the " trustee for distribution among the creditors." Section 88 was the section then relating to beneficed clergymen now replaced by section 50. " Is not section 90 intended to deal with something " of the same nature? In my opinion it is. It speaks of an order " for the payment to the trustee ' of such salary or income, or " ' any part thereof.' In my opinion the court cannot under " section 90 deal with the capacity which a man has to earn " money by the exercise of his personal skill." Later the Lord Justice said[31]: " In my opinion section 90 points to some definite " annual amount which is coming to the bankrupt, and in such " a case a part of it can be set aside for the benefit of his " creditors."

The third member of the court was Lindley L.J.—who, it will be recalled, had participated in the decision in *Ex parte Huggins*[32] and from whose judgment in that case I have already cited. It may be that his language, apparently broad in *Ex parte Huggins*,[32] was not then intended to be as wide as first reading might suggest, because in *Benwell* [33] Lindley L.J. said: "The question "is whether the professional earnings of the present bankrupt "are an 'income' of such a nature as is pointed at by section 90, "and, for the reasons which have been already given, I think that "they are not." That was *Ex parte Benwell* [33] in 1884.

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[29] 14 Q.B.D. 301, 307.

[30] Ibid. 308.

[31] Ibid. 308.

[32] 21 Ch.D. 85.

The next case is that of *In re Shine*,[34] which came before this court in 1892. Mr. Shine was an actor, and the question arose in that case because he had a contract with a manager whereby in return for his undertaking to act at a particular theatre or theatres for a term of two years, he should receive a salary of £30 a week. His affairs having got involved, and a receiving order having been made against him, he then made an arrangement with the manager that the manager should retain £20 out of the £30, and apply that amount towards payment of his debts. Unfortunately all his creditors would not agree with this course, and so the question arose what the rights of the trustee were in relation to this £30 a week. It was held by this court that the payment was salary or income within what was then section 53 of the Act of 1883, but that nonetheless the arrangement that had been made with the manager was valid. I need not take time to deal with the second point, save to point out that if the rights and powers of the trustee were limited to the powers under section 53, then the bankrupt presumably could deal with the income as he had done until the powers were exercised. But the argument also was that this weekly payment received by the actor was neither salary nor income within the meaning of section 53. I note in passing that by this time the Act of 1883 had come into effect, and that section 53 (2), like the subsection in the present Act, but unlike section 90 of the Act of 1869, referred also (and in addition to salary or income) to half-pay, pension, etc. In other words, there is now more of a catalogue in the subsection than there had been in the Act of 1869.

Lord Esher M.R. referred to this earlier case of *Benwell*.[35] He said [36]: "We have held that the word 'income,' as used in "this section, does not mean all income, or all that property "of a man which is generally called his income; for, in most "cases, income of that kind would vest in the trustee on his "bankruptcy, and thus go to the creditors. But the Act assumes "that there is some income of a bankrupt which is not part of

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[33] 14 Q.B.D. 301, 309.

[34] [1892] 1 Q.B. 522; 8 T.L.R. 279, C.A.

[35] 14 Q.B.D. 301, C.A.

[36] [1892] 1 Q.B. 522, 527, C.A.

"his property so as to vest in the trustee in his bankruptcy. It "follows, to my mind, that the income to which section 53 refers "must be income in the nature of a salary."

To the same effect was the language of Bowen L.J.[37]: "It "was said by this court in *Ex parte Benwell*,[38] that the word "'income' in section 53 (2), must be construed by the light of "the word 'salary'—that it is ejusdem generis with it. What is "meant by ejusdem generis? Not that 'income' is identical "with 'salary,' but that there is a genus under which, in common "with 'salary,' it might be classified. In other words, it "possesses some of the same qualities which 'salary' does."

Fry L.J. was of the same opinion, and opened his judgment with these words[39]: With regard to the question whether this "payment is 'salary or income' within the meaning of section 53, "I am of opinion that it is 'salary,' and, if it is not, it is clearly "'income' in the nature of salary."

What I have read from Lord Esher M.R.'s judgment indicates that the court was apparently proceeding upon the view—as I venture to think, a view which may have led to some confusion—that what this actor was receiving was something which did not vest in the trustee, and that section 53 was limited to that class of case, the same confusion (if I may so put it) which I pointed out in *In re Landau*.[40] But I do not think that that element can in any way disable the clear statement in this case, following the previous case of *Benwell*,[41] that the income, in Lord Esher M.R.'s language, "does not mean all income, or all that property of a "man which is generally called income," but is limited to income of the genus which Bowen L.J. defined as having some, at any rate, of the same qualities as a salary.

Those cases have stood unchallenged ever since they were decided. And there is one other—the only case in which this matter has come before the House of Lords—the case of *Hollinshead* v. *Hazleton*.[42] That case concerned a member of the House of Commons representing a constituency in Ireland; and it may well be that only a case from Ireland could now find its way to the House of Lords on this subject. This gentleman had become bankrupt, and the question arose as to the availability for his creditors of his remuneration of £400 a year as a Member of Parliament. It therefore became necessary for the House to say whether that

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[37] [1892] 1 Q.B. 522, 529.

[38] 14 Q.B.D. 301, C.A.

[39] [1892] 1 Q.B. 522, 531.

[40] [1934] Ch. 549, C.A.

[41] 14 Q.B.D. 301, C.A

[42] [1916] 1 A.C. 428; 32 T.L.R. 177, H.L.

£400 a year was salary or income within the corresponding section of the Bankruptcy Act for Ireland, which may be taken to be in terms entirely corresponding to those of the present section 51 (2) of the Act of 1914.

Various other points were raised and dealt with at some length, including questions of public policy; but it is, I think, quite plain that Lord Atkinson approved the limitation which had been put on the word "income" in *Shine's* case.[43] After referring to the possible grounds of public policy applicable in the case of a Member of Parliament and his remuneration as such, Lord Atkinson said[44]: "I should be inclined to hold that the sum paid "was a 'salary.' If any one of the other three,"—that was the other three grounds for saying as a matter of public policy that this remuneration should be paid—"I should be inclined to hold "it was 'income' in the nature of a salary, but I think, as the "judges thought in *Shine's* case,[45] it must be either the one or "the other."

We have been through all the speeches in that case, and I do not myself think that it will assist if I make further citation from them. I find in none of them anything which qualified the conclusion laid down in *Benwell*[46] and *Shine*.[47] Indeed, the passage which I have read from Lord Atkinson's speech seems to me to approve it. As I pointed out in my judgment in *Tennant's* case,[48] if certain language of Lord Parker's had been accepted as defining the scope of these subsections, it might have very much assisted the result in this and other cases, namely, the suggestion that section 51 (as it now is) of the Act of 1914 should be confined in all cases to salaries or other income which was by its nature at common law inalienable. But as I observed, that suggestion was not necessary in the decision in *Hollinshead* v. *Hazelton*[49] and was not reflected in anything said by the other noble Lords.

The citations I have made, as I think, justify the conclusion that the word "income" in this subsection is limited, and is limited in the way that I have already more than once defined. If that is so, then, as I said at the beginning of my judgment, the result adverse to the appellant seems to me inevitably to follow, and I repeat also that that result appears to me to be in accordance with common sense, and what I believe to be the intention underlying this legislation.

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[43] [1892] 1 Q.B. 522, C.A.

[44] [1916] 1 A.C. 428, 449, H.L.

[45] [1892] 1 Q.B. 522, C.A.

[46] 14 Q.B.D. 301, C.A.

[47] [1892] 1 Q.B. 522, C.A.

[48] [1956] 1 W.L.R. 874, C.A.

[49] [1916] 1 A.C. 428, H.L.

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I think that the general effect is not entirely satisfactory. The intrusion of *Landau's* case [50] and what followed it has perhaps added some confusion to this branch of the law; and it may be that it is a matter which on some future occasion Parliament will reconsider. It seems unlikely that, except possibly from Northern Ireland, the matter can again come before the House of Lords; but if in any circumstances it did, I hope that the House would consider carefully the reasoning in the case of *Landau* [50] and its correctness, and also the correctness of the decision in *Tennant's* case [51] which this court felt itself bound to decide as it did (as did Upjohn J.) because of the earlier decision in *Landau.*[52] But without saying more, I do in this case emerge from the jungle on the side of Mr. Forrester-Paton, and therefore would dismiss the appeal.

UPJOHN L.J. I agree, and I desire to add only a very few words. My Lord has reviewed the authorities, and has shown clearly the conflicting views that have been taken in this court as to the precise ambit of the word " income " used in section 51 (2). No doubt, " income " shorn of all context is as wide a word as one could desire to use; and, broadly speaking, that seems to have been the construction adopted in the cases of *Huggins* [53] and *Landau,*[54] but, as my Lord has pointed out, in the intermediate cases of *Benwell* [55] and *Shine* [56] a much more limited view of the ambit of the word " income " has been adopted in this court.

In those circumstances a critical appreciation of the actual section itself cannot be out of place. I desire to draw attention only to the fact that the section is in that part of the Bankruptcy Act which is dealing with the realisation of property. It follows section 50. Section 50 is dealing with the sequestration of the profits of a benefice upon bankruptcy, and it provides that the bishop may nevertheless appoint to the bankrupt a stipend for carrying out his duties.

It is then, I think, material to read the marginal note to section 51, although I appreciate that it cannot control the language used in the section itself. The note is in these terms: " Appropriation of portion of pay or salary to creditors." Section 51 (2) then starts in this way: " Where a bankrupt is in receipt of

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[50] [1934] Ch. 549, C.A.
[51] [1956] 1 W.L.R. 874, C.A.
[52] [1934] Ch. 549, C.A.
[53] 21 Ch.D. 85, C.A.
[54] [1934] Ch. 549, C.A.
[55] 14 Q.B.D. 301, C.A.
[56] [1892] 1 Q.B. 522.

"a salary or income other than as aforesaid," that is, other than pay or salary of those in the service of the Crown which is dealt with by subsection (1). I should have thought that in that context the word "income" would plainly have a somewhat limited meaning; and that the draftsman of the Act was not dealing with income generally, such as income arising under a settlement. But if there were any doubts at that stage, it would seem to me that they are removed by the additional description as to the ambit of the section indicated by the words immediately following, "or is entitled to "any half-pay or pension or to any compensation granted by the "Treasury." That appears to me to indicate quite clearly that there is some limit to be put upon the word "income" where it occurs in the section. Of course, I appreciate that the compensation granted by the Treasury may be income or capital, but I do not think that affects the present matter.

The matter is then summarised at the end of the section by a comprehensive description of the matters upon which the court is empowered to "make such order as it thinks just for "the payment of the salary, income, half-pay, pension or "compensation," and so on. I cannot think for one moment that in using that description, and in sandwiching the word "income" in between "salary" and "half-pay," the draftsman of the Act intended the word "income" to have the wide ambit which Mr. Muir Hunter has tried to persuade us that it bears; and I agree with my Lord in thinking that the proper limit is to describe it as income in the nature of salary, but without attempting any further definition.

I share my Lord's doubts as to whether *In re Landau*[57] was correctly decided, though, of course, it and *In re Tennant*[58] bind this court in cases to which they are properly applicable. Like him, I hope that it may be possible (although it would seem unlikely) that the matter may be reviewed in a higher court. I agree that this appeal should be dismissed.

Pearson L.J. I agree with both the judgments which have been delivered, and I have nothing to add to them.

Forrester-Paton. May I ask your Lordships to deal with the question of costs? The appellant is an assisted person. He deposited the security of £20. There was an application that it should be dispensed with, but it was not dispensed with, and I think the court intimated that that question should be dealt with, if it arose, at the conclusion of the hearing of the appeal.

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[57] [1934] Ch. 549.

[58] [1956] 1 W.L.R. 874.

LORD EVERSHED M.R. Prima facie you would say, I suppose, that the order should be that the £20 be paid out to the trustee? Did that come from the legal aid fund?

Muir Hunter. No, my Lord; it is one of the lacunae in the provisions relating to the legal aid scheme that they have not dealt with the question of security. Under rule 129 of the Bankruptcy Rules, 1952, an intending appellant must deposit the sum of £20 as security for the costs of an appeal although the Court of Appeal has power to dispense with security. Application for which was made by counsel on behalf of the appellant in March of last year. That sum was in fact paid in by my instructing solicitor for the purpose of lodging the appeal without which the appeal cannot be set down; it was not the bankrupt's money, and never has been. When application was made on March 21, 1960, in dismissing the application, as I am instructed, your Lordships' court (the Master of the Rolls, Pearce and Harman L.JJ.) indicated that the court might adopt the same attitude to the £20 as had been adopted in the Divisional Court below. The Divisional Court had ordered the £20 deposited as security for the costs of the appeal to that court to be paid out to the bankrupt's solicitor, and made no other order as to costs except, of course, the order for legal aid taxation. The legal aid fund, however, does not recognise any liability for the reimbursement as a disbursement of a sum deposited as security.

UPJOHN L.J. It is all very well; but if it became the common practice that solicitors in legal aid cases would deposit £20 expecting to be reimbursed, the whole object of the regulations, which aim at preventing the making of frivolous applications, might well be destroyed. A solicitor might well adopt this course in a non-legal aid case, and expect to have it paid out, but so far as my experience goes in the Bankruptcy Court I do not think that would be right.

Muir Hunter. The Divisional Court, of course, took the view that this was a difficult case, and gave leave to appeal with great alacrity.

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UPJOHN L.J. Speaking for myself, in the ordinary case I should be entirely against ordering any repayment, even if made by a solicitor, but this is a very exceptional case. No doubt the debtor, fortified by certain decisions of this court, thought that perhaps the law was not quite what we have held it to be, and he has come to this court with that in mind in what is from some points of view a difficult case.

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PEARSON L.J. This is the difficulty which troubles me. If there is a case which ought to be argued, and it cannot under the rules be brought to appeal unless the solicitor for the appellant deposits £20, it seems a little hard that the solicitor should have to forfeit his £20 because, after much argument and consideration of the authorities, on which it might be said that in some respects previous decisions of this court were open to question, the case goes against him and he has to suffer in that way personally. That is what troubles me.

LORD EVERSHED M.R. One comment on that is that it might be thought that the legal aid fund in a case of this sort ought to find the deposit.

There is a matter of principle involved here. What we will do is to direct that half of this sum be paid back to the solicitor for the appellant, and half to the trustee. I am sorry if the solicitor is £10 out of pocket, but he may get it somewhere else. Perhaps, as Mr. Forrester-Paton said, he might be said to have taken a risk, and we will relieve him of it to the extent of 50 per cent.

Appeal dismissed with costs.

Solicitors: *Christian & Co. for Joseph Lester & Co., Leeds; Paisner & Co. for J. S. & P. Walsh & Co., Leeds.*

B. A. B.

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Nov. 9, 10, 11.

Lord Evershed M.R., Harman and Donovan L.JJ.

In re BUGLE PRESS LTD.
APPLICATION OF H. C. TREBY.

[00834 of 1959.]

In re HOUSES AND ESTATES LTD.

[00833 of 1959.]

Company—Amalgamation—Scheme—Opposition by minority shareholder—Statutory notice pursuant to offer to acquire shares by transferee company—Application by dissenting shareholder—Compulsory sale of shares—Discretion of court—Purchase order—Whether scheme unfair—Onus of proof—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 209 (1).

Of the three shareholders in a publishing company with an issued share capital of 10,000 shares of £1 each, the two majority shareholders each held 4,500 and the minority shareholder the remaining 1,000 shares. In 1958, the majority shareholders promoted and caused to be incorporated a transferee company to the memorandum of which they were the sole subscribers, and of which they each held 50 of the 100 issued shares. The transferee company did not carry on business, but on July 14, 1959, it made an offer to all three shareholders for their shares at £10 for each share. The offer was based on a valuation made by independent valuers of the fair price for the transferor company's share capital as £100,000. In the letter making the offer it was stated that the majority shareholders would accept. The minority shareholder refused the offer. The transferee gave notice of intention to exercise the statutory power of compulsory acquisition under section 209 of the Companies Act, 1948,[1] and the minority shareholder sought a declaration under the section that the transferee company was neither entitled nor bound to acquire his shares on the terms offered, notwithstanding the approval of nine-tenths of the shareholders. The minority shareholder filed evidence to show that the offer was below the value of his shares. The transferee company filed no evidence to support the valuation or to show the nature of the instructions given to the valuers or to give details of the information on which it was based.

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[1] Companies Act, 1948, s. 209 (1): "Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as 'the 'transferor company') to another company, whether a company within the meaning of this Act or not (in this section referred to as 'the 'transferee company'), has, within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and when such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which,

Buckley J. held that in the circumstances the onus of showing that the price was fair was on the transferee company and, as they had not discharged the onus, the minority shareholder was entitled to the declaration sought. The transferee company appealed:—

Held, that the minority shareholder had shown that there were special circumstances why the court should, in the exercise of the discretion conferred by section 209 of the Act of 1948, "order "otherwise" than to sanction the expropriation of the minority holding. Although the transferee company was in law distinct from its only two shareholders, in substance it was the same as the majority shareholding in the transferor company. In such circumstances, unless good reasons in the interest of the company were shown making expropriation of the minority interest desirable, the court should "order otherwise."

In re Hoare & Co. (1933) 150 L.T. 374; *In re Press Caps Ltd.* [1949] Ch. 434; [1949] 1 All E.R. 1013, C.A. distinguished.

Decision of Buckley J., post, p. 275; [1960] 2 W.L.R. 658; [1960] 1 All E.R. 768 affirmed.

In 1950, Bugle Press Ltd., hereinafter called the "transferor "company," was incorporated to carry on the business of booksellers, publishers and other like businesses referred to in its memorandum of association. Its principal business was the publication of a magazine devoted to advertisement for the sales of secondhand cars and to similar advertisements. The authorised and issued share capital of the company was 10,000 shares of £1 each fully paid, all of one class, of which 9,000 were at all material times held in equal moieties by George Douglas Shaw and Henry Robert Jackson, who were the two directors of the company. They are hereinafter together called "the majority "shareholders." The remaining 1,000 shares were at all material

"under the scheme or contract, the "shares of the approving shareholders "are to be transferred to the transferee company: Provided that where "shares in the transferor company of "the same class or classes as the "shares whose transfer is involved are "already held as aforesaid to a value "greater than one-tenth of the aggregate of their value and that of the "shares (other than those already "held as aforesaid) whose transfer is "involved, the foregoing provisions of "this subsection shall not apply unless "—(*a*) the transferee company offers "the same terms to all holders of "the shares (other than those already "held as aforesaid) whose transfer is "involved, or, where those shares "include shares of different classes, "of each class of them. . . ."

times held by Henry Charles Treby, hereinafter called the "minority shareholder." On September 5, 1958, a company, Jackson and Shaw (Holdings) Ltd. (hereinafter called the "transferee company"), was incorporated. The company was promoted by the majority shareholders who were the only members and the directors. The transferee company apparently carried on no business, but on July 14, 1959, solicitors acting for it wrote stating that the company was proposing to make an offer to purchase the whole of the issued share capital of the transferor company. The letter continued: "To this end, there have been "given facilities for an independent firm of accountants to value "the said shares. This has been done by Messrs. Price Water-"house & Co. and their figures are £100,000. . . . It is a known "fact that Messrs. Jackson and Shaw, the holders of 90 per "cent. of the issued capital . . . will accept this offer. Your "client [the minority shareholder] would receive should he "accept . . . £10,000."

The minority shareholder did not accept that offer because he considered that the value of his holding of shares in the transferor company was considerably more than the amount offered for it. In his affidavit filed on September 25, 1959, he set out his reasons for considering that the value of the transferor company's undertaking was greater than the value of £100,000 put on it by Price Waterhouse & Co. They were that in April, 1959, and in May, 1959, offers had been made either by the majority shareholders, or on behalf of the transferee company, for his holding in the transferor company of sums appreciably in excess of £10,000, namely, £12,500 and £14,500, and that in correspondence which he had had with other persons who were experienced in dealing with property of that kind in the publishing and newspaper world he had found that those other people had agreed with his view that the price of £10,000 would be too low. He said that in excluding reference to the profits of the transferor company for the six months ended April 30, 1959, Price Waterhouse & Co. had overlooked an important element which he considered that they ought to have taken into account in arriving at their valuation, and that the printing dispute—which was the reason given by Price Waterhouse & Co. for ignoring the profits of that half-year—was, in fact, a transient matter which could not affect the true value to be put on the undertaking of the transferor company.

He also mentioned in his affidavit that one of the figures given in Price Waterhouse's valuation, being the figure for the profits for the half-year which they said they did not pay any attention to, was wrong by an amount of £5,000. The offer having been declined, the transferee company gave the minority shareholder notice under section 209 of the Companies Act, 1948, that it intended to exercise its statutory rights of compulsory acquisition under that section. In fact, the notice was given before the interval required by the section had elapsed, but by agreement between the parties no point was taken on that and the notice was treated as having been duly given. The minority shareholder applied by originating summons for a declaration under the section that the transferee company was neither entitled nor bound to acquire his shares in the transferor company on the terms of a "scheme and contract" dated July 14, 1959, notwithstanding that it had been approved by the majority of the shareholders.

The facts relating to the second appeal, Houses and Estates Ltd., were substantially the same as those with regard to the transferor company, except that the amount of the issued share capital of the company and, consequently, the price offered, differed, and the 90 per cent. interest was held by the majority shareholders and their respective wives.

Sir Milner Holland Q.C. and *Morris Finer* for the applicant, the minority shareholder. This matter is within a very small compass and is one of principle. The question is whether parties ought to be allowed to use the section in the way in which it is here sought to be used. There is also a question whether the offer is as high as it ought to be. It is conceded that on the authorities the law is that, where there has been an offer which has been accepted by a body of independent shareholders holding 90 per cent. of the shares affected, it is prima facie for the person objecting to it to show that the proposal ought not to be binding on him also. One thing, however, that section 209 does not do is to make it part of the law that a 90 per cent. majority of the shareholders can, as a matter of course, acquire the shares of the other 10 per cent. at a fair value. It is quite clear that what is sought to be done in the present case is a mere device which does not give effect to the spirit of the Act; and the court ought to "order otherwise" unless some special case is made out by the acquiring shareholders in the circumstances. Here, there are no 90 per cent. of disinterested shareholders who have accepted this offer. *In re Sussex Brick Co.*,[2] *In re Hoare & Co.*[3] and

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[2] Post, p. 289, note.

[3] (1933) 150 L.T. 374.

In re Press Caps Ltd.[4] do not apply to a case of this nature. In *In re Hoare & Co.*,[5] which is the locus classicus, Maugham J. said that the legislature had not thought fit to indicate in any way, however remote, the grounds on which it thought that the court ought to intervene, and that the onus was on the dissenting shareholders to show why their shares ought not to be acquired by the transferee company; but there the salient fact was that more than 90 per cent. of disinterested persons thought the offer reasonable. In any event, there is, in the present instance, uncontradicted evidence that the figure is too low and that the offer is not a fair one; and on that ground alone the court is asked "to order otherwise."

Ralph Instone for the transferee company. The applicant's argument is founded on the view that the offer under section 209 is vitiated by the fact that the same persons controlled the transferor and transferee companies; but, if the offer is within the terms of the section, the only question is whether or not the offer price is fair. As to this, Vaisey J. held in *In re Sussex Brick Co. Ltd.*[6] that the applicant must show that the offer is unfair to him personally, and that the unfairness must be obvious and patent. The court will not make its own statistical analysis of the offer but will deal with the matter on the evidence: *Dean* v. *Prince*,[7] *per* Lord Evershed M.R. and Denning L.J. No argument can be advanced to show that Price Waterhouse & Co. did not get all the information that they wanted. There has not been shown any miscarriage of justice which would justify the court in interfering, nor has there been any obvious and patent unfairness.

The question of unfairness, in the case of a cash offer, depends on whether the price offered is a fair price for what the applicant owns, namely, a 10 per cent. interest in a private company. He is not entitled to 10 per cent. of the value of its assets: see *Short* v. *Treasury Commissioners*,[8] *per* Lord Porter, and *In re Press Caps Ltd.*,[9] *per* Somervell L.J. and Wynn-Parry J. But the whole of the applicant's evidence as to price is based on the erroneous premise that he is so entitled; and he has, therefore, not begun to discharge the onus which is on him.

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[4] [1949] Ch. 434; [1949] 1 All E.R. 1013, C.A.

[5] 150 L.T. 374.

[6] Post, p. 289, note.

[7] [1954] Ch. 409; [1954] 2 W.L.R. 538; [1954] 1 All E.R. 749, C.A.

[8] [1948] A.C. 534, 543; 64 T.L.R. 400; [1948] 2 All E.R. 509, H.L.

[9] [1949] Ch. 434.

As to the contention that this is a "device" or a "travesty," the offer falls squarely within the terms of the section and, since the price is payable in cash, the purchaser's identity must be immaterial. The price cannot be unfair merely by reason of the identity of those who are offering it. There cannot in this case be any ground for suggesting that Jackson and Shaw have acted mala fide. A mortgagee exercising a power of sale is at liberty, where there is no suggestion that the price is unfair, to sell to a company in which he is interested: *Farrar* v. *Farrar's Ltd.*[10]

Sir Milner Holland Q.C. in reply. There is no law that 90 per cent. of the shareholders may compel the remaining 10 per cent. to sell at a valuation. The transferee company would like to use section 209 for that purpose. The applicant's main point is that the "device" employed in this transaction gives to section 209 a "twist" beyond the purpose for which the section was intended; and, if what has been done here is to be considered prima facie proper, it means that the Act has changed the law by providing that a 90 per cent. majority of shareholders can acquire the holding of the remaining 10 per cent. by forming a company and making an offer to themselves. Here, the court should exercise its power under section 209 to "order otherwise."

Buckley J. stated the facts as set out above and continued: In this judgment I think it will be convenient for me to deal with the transferor company in the first case, because the facts of the two cases being in all essentials identical, what I say with regard to that company will also apply with equal force to Houses and Estates Ltd.

Section 209 (1) of the Companies Act, 1948, is in the following terms: "Where a scheme or contract involving the transfer of "shares or any class of shares in a company (in this section "referred to as 'the transferor company') to another company, "whether a company within the meaning of this Act or not (in "this section referred to as 'the transferee company'), has, within "four months after the making of the offer in that behalf by "the transferee company been approved by the holders of not "less than nine-tenths in value of the shares whose transfer is "involved (other than shares already held at the date of the offer "by, or by a nominee for, the transferee company or its sub-"sidiary), the transferee company may, at any time within two "months after the expiration of the said four months, give notice

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[10] (1888) 40 Ch.D. 395.

"in the prescribed manner to any dissenting shareholder that it "desires to acquire his shares, and when such a notice is given "the transferee company shall, unless on an application made by "the dissenting shareholder within one month from the date on "which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the "terms on which, under the scheme or contract, the shares of "the approving shareholders are to be transferred to the transferee company. . . ." Then follows a proviso.

Sir Milner Holland points out that this is not a section which enables the holders of 90 per cent. of the issued shares of a company, or of a class of issued shares of a company, to acquire the shareholding of the 10 per cent. minority—the section expressly prescribes that the transaction must be one between companies, or rather, that the acquiring body must be a company, the subject-matter to be acquired being shares in a company—and no individual can make an offer which, even if it be accepted by 90 per cent. of the recipients of the offer, would entitle that individual to acquire compulsorily the shares of the 10 per cent. dissentient minority. And, he says, if individuals who themselves hold 90 per cent. of the shares in a company constitute a transferee company in which they are the only shareholders, it would be contrary to the policy of the section to allow an offer by that transferee company to operate under the section, because the transferee company would be merely a screen for the 90 per cent. shareholders, there would be no independent majority exercising any sort of disinterested choice in the question of whether or not the offer should be accepted, and the transaction would be merely a device for enabling the 90 per cent. majority to acquire, through the medium of the company formed ad hoc, the shareholding of the minority.

I am bound to say that I see very great force in that argument. Whether, in such a case, if the court were fully satisfied that the price offered to the minority shareholders was a fair price to be offered for their shares, the section ought to be allowed to operate according to its tenor is, I think, a matter which it is unnecessary for me to decide today because, in my view, on the facts of this particular case at any rate, the onus must rest on Mr. Instone's clients to satisfy the court that the price offered is a fair price. In the ordinary case of an offer under this section, where the 90 per cent. majority who accept the offer are unconnected with the persons who are concerned with making the offer, the court pays the greatest attention to the views of that majority. In all commercial matters, where commercial people are much better able to judge of their own affairs than the court is able to do, the court is accustomed to pay the greatest attention to what commercial people who are concerned with the transaction in fact decide; and it has been recognised in a number of authorities to which I have been referred: *In re Hoare & Co.*,[1] a decision of Maugham J.; *In re Press Caps Ltd.*[2]; and an unreported decision of Vaisey J. given on July 22, 1959, in *In re Sussex Brick Co. Ltd.*,[3] that where there is a large majority (and, of course, a 90 per cent. majority is necessarily a large majority) of shareholders who are only concerned to see that they get what they consider to be a fair price for their shares, and who are in favour of accepting the offer, the burden is a heavy one on the dissentient shareholder to say that the offer is not one which he ought reasonably to have to accept. In *In re Sussex Brick Co. Ltd.* Vaisey J. said[3]: "I "think that the applicant"—that is, the dissentient shareholder—"is faced with the very difficult task of discharging an onus which "is undoubtedly the heavy one of showing that he, being the only "man in the regiment out of step, is the only man whose views "ought to prevail." In a case of that kind the onus must rest on the dissentient shareholder to show that the offer is not one which he ought reasonably to be compelled to accept, and that onus is a heavy onus.

This case, however, seems to me to be quite the reverse of that, because here, although as a matter of law the body making the offer must be regarded as distinct from the persons who hold shares in that body, nevertheless, as a matter of substance the persons who are putting forward this offer are the majority shareholders, the only two shareholders in the transferee company, and they are the holders of the 90 per cent. majority shareholding, whose acceptance of that offer it is suggested binds the dissenting shareholder also to accept the offer. In a case of this kind it seems to me that the onus must clearly be on the other side, and that it must be incumbent on the majority shareholders to satisfy the court that the scheme is one with which the minority shareholder ought reasonably to be compelled to fall in.

I have referred to the evidence filed on behalf of the applicant in this case. The transferee company has filed no evidence except an affidavit which has been sworn merely for the purpose of putting in evidence the judgment of Vaisey J. in *In re Sussex Brick Co. Ltd.*[4] It is quite true that the applicant's evidence

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[1] (1933) 150 L.T. 374.

[2] [1949] Ch. 434; [1949] 1 All E.R. 1013.

[3] Post, p. 289, note.

[4] Ibid.

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includes as an exhibit Price Waterhouse's valuation, but a valuation obtained by another party and put in evidence by a dissenting shareholder merely for the purpose of criticising it is not, in my opinion, of any assistance to the transferee company in discharging the onus that the scheme is one with which he ought to be compelled to fall in. That valuation is not attacked in the sense that it is said to be a forgery, or a fraud, or anything of that kind, but it is attacked in the sense that the applicant has made it quite clear in his evidence that he does not agree with the valuation that it contains. ✓

In my view the onus rests on the transferee company to substantiate that valuation and to show that the proposed price is a fair price. To substantiate that valuation they should have filed evidence supporting it, which would have enabled the applicant to cross-examine whatever deponent had sworn an affidavit supporting the valuation, and the court would then have been in a position to see whether or not the valuation was one which it thought reasonable to rely on. At the present time, not only has there been no opportunity for cross-examination, but also the court is even ignorant of the instructions and information on which the valuation was made. It is perfectly true that the valuer says he has had all the information he asked for, but it does not follow that he necessarily asked for all the appropriate information.

In my view, therefore, the onus which I consider rests on the transferee company has not been discharged, and having regard to the unusual nature of this case—unusual in the sense that the 90 per cent. majority shareholders are, themselves, in substance the transferee company—I think this is certainly a case in which the court ought to "order otherwise" within the meaning of the section. In my judgment, the applicant ought not to be compelled to sell his shares at the proposed price in these circumstances.

I propose, therefore, to declare: that the transferee company is not entitled to acquire (I do not think I need say "or bound") the shares of the applicant in the Bugle Press Ltd., or any of them on the terms of the scheme, notwithstanding that it has been approved by nine-tenths of the shareholders of Bugle Press Ltd.

In the other case I will make a similar declaration in appropriate terms in regard to that company. I order that Jackson & Shaw (Holdings) Ltd. pay the costs.

Declarations accordingly.

K. R. A. H.

The transferee company appealed.

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It was conceded on the appeal that the transferee company was promoted in order to invoke the powers of section 209 of the Act of 1948.

Ralph Instone for the transferee company. The first question is whether the price offered is fair. The section does not require that the same amount should be offered to all the shareholders, except in the circumstances mentioned in paragraph (a), so that, in offering the same amount per share for the shares comprising the minority holding as for those held by the majority shareholders, the transferee company have been more generous than they need have been.

The second question is whether, in counting the 90 per cent. of the shareholders in the transferor company, account can be taken of the identity of the individuals controlling the acquisition of the shares by the transferee company. The third parenthesis to section 209 (1) shows that Parliament had not overlooked that there would be circumstances in which certain shares of the company to whom an offer is made ought to be disregarded.

The offer comes within the terms of the section. The authorities show that the onus of proof that the court ought to "order "otherwise" is always, and particularly here, on the dissenter. That onus can be discharged either by showing that the amount offered is not a fair price for the particular holding or, independently of fairness, that the section does not on its true construction apply to the particular circumstances: see *In re Hoare & Co. Ltd.*[1] and *In re Press Caps Ltd.*[2] For the construction of the comparable section 155 of the Companies Act, 1929, see *In re Western Manufacturing (Reading) Ltd.*[3] Alternatively, if the onus is on the transferee company to show that the price offered was fair, the evidence of the independent valuation by a well-known firm of valuers is sufficient to shift it back again to the applicant. The applicant's evidence as to the price which should have been offered was wrongly based on the footing that he was entitled to an equivalent proportion of the assets: see *In re Press Caps Ltd.*[4] Even if that had been a proper basis, the evidence was not sufficient to show what the assets were. Buckley J. confused

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[1] (1933) 150 L.T. 374.

[2] [1949] Ch. 434; [1949] 1 All E.R. 1013, C.A.

[3] [1956] Ch. 436; [1956] 2 W.L.R. 437; [1955] 3 All E.R. 733.

[4] [1949] Ch. 434.

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the question of fairness with the question of onus. If the section applies, despite the nexus between the transferee company and the majority shareholders, then there is no ground for saying that the onus has shifted from the dissenting shareholder in the first place. It has been shown that the offer is prima facie fair, and that, as Vaisey J. said in *In re Sussex Brick Co. Ltd.*,[5] is sufficient.

Under section 287 in a voluntary winding up if the undertaking of the transferor company was sold to a new company the applicant would either have to accept the reconstruction and get shares in the new company, which could be disposed of, or he could elect to dissent and then he could be bought out at a price fixed by arbitration. Section 287 clearly contemplates the expropriation of dissenting minorities at values which are independently determined. From the shareholder's point of view the end result is much the same under the two sections.

Short v. *Treasury Commissioners*[6] is closely analogous, though it concerns a different Act. The relevant inquiry is, what is this particular holding of shares worth, with all its disadvantages to the vending shareholder: see *In re Sussex Brick Co. Ltd.*[7] The court will not make its own statistical analysis of the right price: see *Dean* v. *Prince*.[8] It is not sufficient for the applicant to show that the price offered is open to criticism. It has to be patent and obvious, as Vaisey J. said, "to the meanest intelligence" that the disparity is such that the figure must have been reached on the wrong basis. There must have been an actual mistake or error of principle. If, as in this case, it is merely a matter of opinion whether something should have been included which has been omitted, the court will not upset the valuation. The nuisance value which a minority shareholder may have in the eyes of the other shareholders is not relevant, for the valuation has to be made from the applicant's standpoint. The issue is not whether the valuation is right or not but whether the price offered is fair. The applicant has referred in his evidence to another offer, but an offer from one buyer who was prepared to buy at a particular price does not mean that the shares were worth the sum offered or any other. The effect of the printing strike was pre-eminently a matter of opinion, and it cannot be said that the valuation was vitiated by the valuer's view on that matter. It has been conceded that it was not manifestly unreasonable to disregard the profits for that period because of it. It is also a matter of opinion how much weight should be given to the tenuous interest which the minority shareholder had in the goodwill.

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[5] Post, p. 289, note.

[6] [1948] 1 K.B. 116; 63 T.L.R. 472; [1947] 2 All E.R. 298, C.A.; affirmed [1948] A.C. 534; 64 T.L.R. 400; [1948] 2 All E.R. 509, H.L.

[7] Post, p. 289, note.

[8] [1954] Ch. 409; [1954] 2 W.L.R. 538; [1954] 1 All E.R. 749, C.A.

It is irrelevant whether a contract was, or was not, made with the other shareholders before any communication was sent to the minority shareholder. This is not a device which is outside the section and contrary to the policy of the section. The section enables the holders of 90 per cent. of the shares to get rid of a minority interest on fair terms. There can be no suggestion that the offer was mala fide. Nor is there any question of a fiduciary relationship between Jackson and Shaw and the applicant. As directors of the Bugle Press Ltd. they owed a fiduciary obligation to the applicant, but in transferring shares they were acting in the capacity of shareholders and were not under any fiduciary obligation. Even if there had been any irregularity it would not have made the transaction a nullity—it would have been voidable within a reasonable time. A mortgagee can exercise a power of sale to sell to a company in which he is interested provided that the price offered is fair: *Farrar* v. *Farrar's Ltd.*[9] The argument that it is a mere device might have been put in that case also.

Sir Milner Holland Q.C. and *Morris Finer* for the minority shareholder. The first question is what is the exact ambit and purpose of section 209. It does not provide that holders of 90 per cent. of the shares in a company are entitled to buy out the remainder. The essential feature of the scheme of the section is that the 90 per cent. approving an offer must be independent of the persons making the offer, because they would obviously want to accept it. The offeror, his nominees or a subsidiary must be excluded. If 90 per cent. of independent persons wish to accept an offer, the dissenters have to make a strong case, but that is not this case. If Jackson and Shaw had already agreed to transfer to the holding company, they would have been trustees with a lien for the holding company and, therefore, nominees. It is not submitted that they had in fact done this—there is no information before the court as to what they did and one cannot get discovery under this section. All that has been done is a manifest device which the section was obviously not intended to allow, and though it may have to be conceded that the device is within the literal words of the section, it is a sham. The purpose and scope of the section is indicated by the parenthesis. The section gives the court complete discretion to " order otherwise," and in this case the holders of the majority of the shares should not be allowed to exercise almost compulsory powers.

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[9] (1888) 40 Ch.D. 395, C.A.

The decisions in *In re Hoare & Co.*[10] and *In re Press Caps Ltd.*[11] are plainly right, but the reasoning in both was founded on the compelling ground of a majority of independent offerors. The test is how many of the shareholders think the offer is fair, not what a valuer thinks. In *Dean* v. *Prince*[12] the share transfer was to be at a price fixed by the auditor, and the court said that the bargain should not be disturbed unless it was satisfied that something was plainly wrong, but that does not mean that a valuation cannot be criticised. The court will always entertain evidence of value and form its own view. It is not known on what basis Price Waterhouse & Co. were asked to value or whether they were told the purpose of the valuation. That put in by the applicant was the only available evidence and, as he was not cross-examined, his evidence must be accepted as correct unless patently wrong. *Short* v. *Treasury Commissioners*[13] is not in point.

Morris Finer following. The section presupposes something in the nature of " a scheme or contract " involving the transfer of shares, but a scheme to transfer merely in order to make section 209 applicable is not a scheme or contract such as the section contemplates. The section may, therefore, not apply, but, as the point has not been taken before, it may not now be open.

Ralph Instone replied.

LORD EVERSHED M.R. stated the facts, read section 209, commenting that it was a re-enactment, with only immaterial variations, of section 155 of the Companies Act, 1929. He then referred to the judgment of Buckley J. as follows: The conclusion of Buckley J. is summarised in the paragraph[1]: " In my view, " therefore, the onus which I consider rests on the transferee " company has not been discharged, and having regard to the " unusual nature of this case—unusual in this sense that the 90 " per cent. majority shareholders are, themselves, in substance " the transferee company—I think this is certainly a case in

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[10] 150 L.T. 374.

[11] [1949] Ch. 434.

[12] [1954] Ch. 409.

[13] [1948] 1 K.B. 116.

[1] Ante, p. 278; [1960] 2 W.L.R. 658, 664; [1960] 1 All E.R. 768.

" which the court ought to ' order otherwise ' within the meaning " of the section. In my judgment, the applicant ought not to be " compelled to sell his shares at the proposed price in these " circumstances." In fairness to Mr. Instone's argument I shall read one earlier passage of the judgment[2]: " Whether, in such " a case, if the court were fully satisfied that the price offered " to the minority shareholders was a fair price to be offered for " their shares, the section ought to be allowed to operate according to its tenor is, I think, a matter which it is unnecessary for " me to decide today because, in my view, on the facts of this " particular case, at any rate, the onus must rest upon Mr. " Instone's clients "—that is the transferee company—" to satisfy " the court that the price offered is a fair price."

Mr. Instone, in opening the appeal, put his case broadly as follows. First, he said: this case is within the four corners of the section upon the ordinary construction of its language; secondly, it follows that the onus must be upon the dissident shareholder to show that an order should be made otherwise than as the section envisages; and that argument, I interpolate, depends upon the language of the section which I have already read—" the transferee company shall, unless on an application " made by the dissenting shareholder . . . the court thinks fit to " order otherwise, be entitled and bound to acquire," etc. Thirdly, Mr. Instone conceded that he cannot in this case rely upon the mere fact that 90 per cent. of the shareholders in this company did accept or were prepared to accept this offer, but, says he, since there was an independent valuation of the interest in the company held by the minority shareholder, he fails to discharge the onus which the section puts upon him. Fourthly, such criticisms as are contained in the minority shareholder's evidence of the figures Messrs. Price Waterhouse gave only go at best to show that that eminent firm's valuation of the assets of the company might not be the correct figure for such assets. But that, after all, says Mr. Instone, is not the question; the question is a different one: what is a fair offer for the minority interest in the transferor company? Under the articles it may be added that not unnaturally the minority shareholder's right to take any part in the control and conduct of the company's affairs is very strictly limited indeed. And so, says Mr. Instone, the minority shareholder has not shown that there is anything wrong with the offer as made to him.

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[2] Ante, p. 276.

Finally, Mr. Instone, in support of his propositions, and particularly of the second one as regards the onus, relies upon a decision of Maugham J. in *In re Hoare & Co.*,[3] which was referred to with the express approval of the Court of Appeal in *In re Press Caps Ltd.*[4] In the case last mentioned Somervell L.J. said[5]: "I will refer to the case in which the broad general principle "was laid down which neither side disputed; it is a case decided "by Maugham J. in *In re Hoare & Co.*,[6] where there was an "application of a similar kind in respect of a scheme. In the "course of his judgment, Maugham J. referred to the fact that "the application came before him, as an application of this kind "can only come before the court, when 90 per cent. or more of "the shareholders had accepted the offer, and he said: 'Accord-"'ingly, without expressing a final opinion on the matter, because "'there may be special circumstances in special cases, I am "'unable to see that I have any right to order otherwise in such "'a case as I have before me, unless it is affirmatively estab-"'lished that, notwithstanding the views of a very large majority "'of shareholders, the scheme is unfair,'" and then Somervell L.J. states his own acceptance of that principle.

It must be borne in mind that *In re Hoare*,[6] followed in this respect by *In re Press Caps Ltd.*,[7] was a case in which the 90 per cent. of the shareholders who had accepted the offer were persons wholly independent of the offeror or transferee company. Maugham J. (and I will not make further detailed reference to the decision of *In re Hoare*[8]) after pointing out that the section gave no guide whatever as to the basis upon which the apparently unlimited discretion is to be exercised, stated that where one has in a case of that kind (which would be the ordinary case) 90 per cent. of the shareholders saying: "This is, we think, a good offer "or satisfactory offer," the court will not, in the absence of very strong evidence to show there is something wrong with the offer, substitute its own view of what a fair offer would be and by that means enable, as Vaisey J. picturesquely said in *In re Sussex Brick Co. Ltd.*,[9] the one soldier in the regiment who was out of step to defeat what all the other shareholders had thought was a perfectly proper and fair scheme. As I have said, the section itself gives no guidance and imposes no limit as regards the grounds on which the discretion is to be exercised, and in the ordinary case of a scheme whereby an outside party seeks to acquire the shares of a company, and is not itself interested as a shareholder already, or to the extent that it is not so interested, the principle will be that stated by Maugham J. But one thing is quite plain, which is, that this is not an ordinary case, not a case which is at all analogous to the kind of case which came before Maugham J.

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[3] (1933) 150 L.T. 374.

[4] [1949] Ch. 434; [1949] 1 All E.R. 1013, C.A.

[5] [1949] Ch. 434, 440.

[6] 150 L.T. 374.

[7] [1949] Ch. 434.

[8] 150 L.T. 374.

[9] [1960] 2 W.L.R. 665n.; [1960] 1 All E.R. 772.

Mr. Instone freely accepts that the mechanism of the section has here been invoked by means of the incorporation of this holding company, Jackson & Shaw (Holdings) Ltd., especially for the purpose, and in order to enable the two persons, Shaw and Jackson, to expropriate the shares of their minority colleague, Treby. He says that although that is undoubtedly true, nevertheless, in the result, the case does fall within the strict language of the section and falling within it the consequences must follow. If that argument is right, it would enable by a device of this kind the 90 per cent. majority of the shareholders always to get rid of a minority shareholder whom they did not happen to like. And that, as a matter of principle, would appear to be contrary to a fundamental principle of our law that prima facie, if a man has a legal right which is an absolute right, then he can do with it or not do with it what he will.

Mr. Finer, who followed Sir Milner Holland in arguing for the minority shareholder, took the point that the opening words of the subsection required first it to be shown that there exists a scheme or contract involving the transfer of shares. It is true that in one sense, possibly derogatively, there is shown to be a "scheme" in this case; but, as Mr. Finer contended, there is nothing established which could be called a scheme or contract as the words would apparently indicate. And if that argument were well founded the result would be that the case would be wholly outside the section. That point does not appear to have been taken in the court below and it is not referred to by Buckley J., nor was it taken in his argument before us by Sir Milner Holland. Finally, there is no cross-notice of appeal here seeking to uphold the judgment on that ground. In the circumstances I do not think it would be right for this court now to come to a decision basing itself on an acceptance, if it should think it right to accept it, of Mr. Finer's argument. But it is, I think, relevant (and we are indebted to Mr. Finer for drawing our attention to it) to note that by the terms of the section itself one must have regard to what lies behind the invocation of the section. It presupposes the existence of a scheme or contract involving a transfer of shares, and that supposition is expressed when one looks not only at the minority shareholder's application but at Buckley J.'s order. One adds, I think, to that, by way of background to the necessary approach, the words in the parenthesis following the reference to the nine-tenths fraction "other than "shares already held at the date of the offer by, or by a nominee "for, the transferee company," etc. Mr. Instone has pointed out, with justice in my judgment, that although Shaw and Jackson are for all practical purposes the same as Jackson & Shaw (Holdings) Ltd., nevertheless it is not true to say on the evidence that at the date of the offer any shares were held either by the transferee company or by a nominee for the transferee company. Nevertheless, when regard is had to the opening words and to the parenthesis, it seems to me plain that what the section is directed to is a case where there is a scheme or contract for the acquisition of a company, its amalgamation, re-organisation or the like, and where the offeror is independent of the shareholders in the transferor company or at least independent of that part or fraction of them from which the 90 per cent. is to be derived. Even, therefore, though the present case does fall strictly within the terms of section 209, the fact that the offeror, the transferee company, is for all practical purposes entirely equivalent to the nine-tenths of the shareholders who have accepted the offer, makes it in my judgment a case in which, for the purposes of exercising the court's discretion, the circumstances are special—a case, therefore, of a kind contemplated by Maugham J. to which his general rule would not be applicable. It is no doubt true to say that it is still for the minority shareholder to establish that the discretion should be exercised in the way he seeks. That, I think, agreeing with Mr. Instone, follows from the language of the section which uses the formula which I have already more than once read "unless on an application made by the dissenting "shareholder the court thinks fit to order otherwise." But if the minority shareholder does show, as he shows here, that the offeror and the 90 per cent. of the transferor company's shareholders are the same, then as it seems to me he has, prima facie, shown that the court ought otherwise to order, since if it should not so do the result would be, as Mr. Instone concedes, that the section has been used not for the purpose of any scheme or contract properly so called or contemplated by the section but for the quite different purpose of enabling majority shareholders to expropriate or evict the minority; and that, as it seems to me, is something for the purposes of which, prima facie, the court ought not to allow the section to be invoked—unless at any rate it were shown that there was some good reason in the interests of the company for so doing, for example, that the minority shareholder was in some way acting in a manner destructive or highly damaging to the interests of the company from some motives entirely of his own.

I prefer, therefore, to base my decision on the broad ground which I have tried to state and do not propose to involve myself in the conflict which has arisen on the evidence as to the correctness of Messrs. Price Waterhouse & Co.'s valuation of the company or its undertaking or its shares; save only to say this, that as Sir Milner Holland pointed out, in the absence of any evidence filed on behalf of the transferee company, and, therefore, of any opportunity of cross-examination, the fact that offers were made to the minority shareholder in April and May, 1959, and in an ascending scale of figures appreciably greater than that contained in the offer in July, and the facts as to the profit earning of this company during the first quarter of the year 1959, at least show that there is no case here established why the discretion, given the major premise to which I have referred, should not be exercised in the way in which Buckley J. exercised it.

For these reasons I think that we could not properly, and should not, interfere with Buckley J.'s exercise of discretion. I should add this. Buckley J. based himself, or is recorded as basing himself [10] on the view that the onus rested upon Mr. Instone's clients, the transferee company, to satisfy the court "that the price offered is a fair price." I would, with respect, not like to let my decision rest upon that proposition. I would prefer, as I have said, to put it on the broader ground which is the ground that Buckley J. himself expressed in the concluding paragraph of his judgment which I earlier read.

HARMAN L.J. I agree. In my judgment this is a barefaced attempt to evade that fundamental rule of company law which

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[10] Ante, p. 278.

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BUGLE PRESS LTD., *In re.*

Harman L.J.

forbids the majority of shareholders, unless the articles so provide, to expropriate a minority. It would be all too simple if all you had to do was to form a £2 company and sell to it your shares and then force the outsider to comply. If the point had been taken earlier I for one should have been prepared to hold that this case never came within the section at all. Indeed, no serious attempt to comply with the section has ever been made in the present case, and that can be seen when one looks at the summons which talks about the scheme and contract dated July 14. There is no sign anywhere of any scheme or contract made on July 14 and, therefore, the section does not, I think, begin to operate. The minority shareholder might have ignored this notice altogether, but he had not the courage to do that, and I am not surprised. So he made his application and, thereby I suppose, he admitted that there was a scheme and a contract of July 14 though everybody must have perfectly well known that there was none. Apart from that, these two individuals, the majority shareholders, or their advisers, did not even trouble to comply with the next part of the section, namely, the length of delay and the notice which they had to give. They were in a hurry and they ignored that part of it. The minority shareholder's advisers waived that objection also, and he, having applied to the court under the section, had, like any other applicant, to prove his case, that is to say, to set up a case which the respondents had to answer. He did that, it seems to me, as it seemed to my Lord, quite simply by showing that the transferee company was nothing but a little hut built round his two co-shareholders, and that the so-called "scheme" was made by themselves as directors of that company with themselves as shareholders and the whole thing, therefore, is seen to be a hollow sham. It was then for the transferee company to show that nevertheless there was some good reason why the scheme should be allowed to go on. The transferee company, whether because the two members did not wish to go into the witness-box and be cross-examined or for some other reason, did not file any evidence at all; they merely purported to rely on a copy of a valuation said to have been made on their behalf by a firm of chartered accountants. That valuation was not sworn to, nobody was able to cross-examine the authors of it and there is in my judgment no case in answer. The minority shareholder has nothing to knock down; he has only to shout and the walls of Jericho fall flat. I am surprised that it was thought that so elementary a device would receive the court's approval.

I would dismiss this appeal.

DONOVAN L.J. I agree with both judgments.

Appeals dismissed with costs.
Leave to appeal to the House of Lords refused.

Solicitors: *Blakeney & Co.; Henry E. Goodrich.*

E. D.

[CHANCERY DIVISION.]

NOTE.

In re SUSSEX BRICK CO. LTD.

1959
July 20, 22.

Vaisey J.

Company—Amalgamation—Scheme—Scheme for acquisition of shares by transferee company—Whether scheme unfair—Onus of proof.

ADJOURNED SUMMONS.

The applicant, Frank Cunningham, the holder of 5,500 ordinary shares of 5s. each in the Sussex Brick Co. Ltd., sought a declaration under section 209 of the Companies Act, 1948, that the respondent company, Redlands Holdings Ltd., was neither entitled nor bound to acquire his shares in the Sussex Brick Co. Ltd. on the terms of a scheme or contract dated September 16, 1958, notwithstanding that the same had been approved by the holders of nine-tenths in value of the shares whose transfer was involved.

Ralph Instone for the applicant.
John Mills for the respondent company.

VAISEY J. This matter arises out of an offer made by the respondent company, Redlands Holdings Ltd., to acquire the preference and ordinary shares of the Sussex Brick Co. Ltd., on certain terms set out in a scheme dated September 16, 1958, sent to the various shareholders, or, at any rate, to the ordinary shareholders, together with an explanatory letter. The offer, in effect, was that for every three shares in the brick company, two shares in the respondent company would be taken in lieu. The applicant was unwilling to accept that offer and he brings this summons under section 209 of the Companies Act, 1948, to establish his right to refuse to do so: he is an ordinary shareholder and he says that he does not want to have the shares which he holds in the brick company replaced by shares in Redlands Holdings Ltd.

Section 209 of the Companies Act, 1948, is a long, complicated section, and subsection (1), the only relevant subsection, can be sufficiently summarised as regards its effect in the terms used by Somervell L.J. in *In re Press Caps Ltd.*[1]: "[It] deals with and confers a power "to acquire shares of shareholders dissenting from a scheme by which "one company desires to obtain the transfer to itself of the shares or "any class of shares in another company," and he pointed out that the section corresponds exactly with section 155 of the Companies Act, 1929.

The matter has been considered in more than one case, and the governing considerations were well stated by Maugham J. in *In re Hoare & Co. Ltd.*[2] Summarising his judgment, it really comes to this: that an applicant, taking advantage of section 209, has, in effect, to show that the scheme is to him unfair, and that is the yardstick which is accepted and adopted as the criterion which enables a shareholder to get out of the provisions of the section. I think that it is now admitted that unless this scheme is to the applicant unfair he is not entitled to act as a dissenting shareholder under the section and obtain a declaration that he is not bound to transfer his shares.

Whether one's sympathies are with the man who wants to hold on to his shares and not to have them expropriated, or whether one regards such a person as being rather troublesome and not deserving much sympathy, is a matter having nothing to do with this case. The expression "expropriation" used by Maugham J. has been questioned as being inaccurate in its connotation, but the fact remains that procedure under section 209 is for the acquiring, on terms, of the shares of a man who does not want to part with his shares, and one is not surprised that Maugham J.'s decision should emphasise that point of view.

Maugham J. said[3]: "One conclusion which I draw from that "fact"—that is, the fact that the court will not "order otherwise," i.e., allow a man to escape from his obligation—"is that the mere "circumstance that the sale or exchange is compulsory is one which "ought not to influence the court. It has been an expropriation, "but I do not regard that phrase as being very apt in the circumstances "of the case. The other conclusion I draw is this, that again prima "facie the court ought to regard the scheme as a fair one inasmuch as "it seems to me impossible to suppose that the court, in the absence of "very strong grounds, is to be entitled to set up its own view of the "fairness of the scheme in opposition to so very large a majority of "the shareholders who are concerned. Accordingly, without expressing "a final opinion on the matter, because there may be special circum"stances in special cases, I am unable to see that I have any right to "order otherwise in such a case as I have before me, unless it is "affirmatively established that, notwithstanding the views of a very "large majority of shareholders, the scheme is unfair. . . .

"Now the court has been quite properly asked to consider the "balance sheets of the two companies concerned, and quite fair and "reasonable contentions have been put before me on behalf of the "applicants tending to show that notwithstanding the facts with "regard to the acceptance of the offer which I have mentioned, the

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[1] [1949] Ch. 434, 439; [1949] 1 All E.R. 1013, C.A.

[2] (1933) 150 L.T. 374.

[3] Ibid. 375.

"offer is really not a fair one. The affidavit of Mr. Sharples on behalf "of the applicants is one which I have very carefully considered, but "I do not think that it establishes the view which he takes as a correct "one, that the transaction, looked at from the question of capital "values, is in the least unfair. It is manifest that from modern balance "sheets very little real information can be obtained as to the capital "value of assets, even treating the companies as going concerns, and "of course on the footing of a liquidation the balance sheet figures are "almost useless. But taking these companies as being sound and "solvent concerns with excellent prospects, I am not persuaded that "the offer made by Charrington was an unfair one from the point of "view of the value of the shares and cash which were offered to the "shareholders of Hoare & Co. . . .

"On the whole, I do not think I am justified in coming to the "conclusion that the applicants have established that the offer is one "in regard to which the court would think fit to order that the "transferee company is not entitled to acquire these shares substantially "on the terms of the original scheme. I confess I have some sympathy "with people in the position of the applicants. I am myself not quite "able to understand why the legislature should ever have passed section "155 at all, and therefore I am not at all indisposed to consider the "objections of such applicants as I have before me."

That being the undoubted law, I think that the present scheme and the present offer are undoubtedly open to criticism, and that a clever business man, a man well versed in company law and matters which influence dealings on the Stock Exchange, could find a good many loopholes in it. That amounts to this: the scheme is open to criticism; but does that go far enough? That is the difficulty in the present case. It has not been suggested on behalf of the applicant that there has been any bad faith or any intentional misleading of the applicant, but although the scheme is open to a good deal of criticism, which might be enlarged on at great length in one or more circulars, what exactly the effect on the mind of the shareholders would have been I do not pause to inquire. That the scheme is open to criticism I have no doubt, but can it be said therefore to be unfair? I think it rather difficult to predicate unfairness in any case in which there has been perfect good faith on the side of the person who is alleged to have been unfair. I think that the applicant is faced with the very difficult task of discharging an onus which is undoubtedly the heavy one of showing that he, being the only man in the regiment out of step, is the only man whose views ought to prevail. That is the difficulty he is faced with in the present case.

I agree that certain criticisms set out in the applicant's affidavit show that a good case could be made out for the formulation of a better scheme, of a fairer scheme, of one which would have been more attractive to the shareholders if they could have understood the implications of the criticisms. I have no doubt at all that a better scheme might have been evolved, but is that enough? Is it necessary to establish the validity of such an offer as put forward in the present case? Is there any point in the scheme on which a better view might have prevailed, and rather more generous treatment might have been offered to persons whose shares are sought to be expropriated? A better and fairer offer might have been made, possibly, but I do not think that because a scheme is not 100 per cent. fair or right there is the kind of unfairness with which Maugham J. was dealing in the case to which I have referred. The mere finding of items, or details, in the scheme which are open to valid criticism, is not unfairness consistent with the spirit of that judgment.

A scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence. It cannot be said that no scheme can be effective to bind a dissenting shareholder unless it complies to the extent of 100 per cent. with the highest possible standards of fairness, equity and reason. After all, a man may have an offer made to him and, although he would prefer something better, would be quite prepared to accept it because it was good enough in all the circumstances. It may be that the grounds for criticising the present scheme are not grounds of such a nature as to render the whole thing unfair in the sense in which Maugham J. used the words in the case which I have cited.

A good deal of light is thrown in the consideration of this section in *In re Press Caps Ltd.*,[4] where the test laid down by Maugham J. in *In re Hoare & Co.*[5] that where the statutory majority has accepted the offer, the onus must rest on the applicant to satisfy the court that the price offered is unfair, was approved.

So far as the Stock Exchange is concerned I have some information about the present share values. I have no information about what the present value of the brick shares is because they are no longer quoted, but there is no doubt that three shares in the brick company which were worth at the relevant date something like 21s. 3d. have now been transposed into two Redlands shares which are worth today on the Stock Exchange quotation 43s. 1d. It is a rather curious result that a man who parts under compulsion with property which all agree was worth something in the neighbourhood of 22s. now finds himself in possession of property which, according to Stock Exchange quotations, is worth nearly twice that amount, i.e., 43s. It is rather curious for him to say: "It is a very unfair bargain I struck. True, I have shares "worth twice as much as my former shares were worth, but still it is "unfair because I think greater consideration ought to have been paid "to various factors and I still say it is a very unfair scheme." The shares were less than half the value of the shares given in substitution for them, and it is a little hard to see that such a bad bargain has been driven. True, the scheme offers specific grounds for criticism, but had the matter been probed still further, and had there been some revaluations and a great deal of inquiry into the finances of the two companies, they might well have led to the conclusion I have formed that the applicant will receive twice what he is giving up in value. If I accede to his request I do not see that a very attractive prospect lies before him. If he retains his shares in the company they will not be quoted, and will probably be quite unsaleable. Ninety per cent. of the shareholders think the scheme is all right.

As regards the company's circular, I think it is only fair to say that the criticism is not so much of one or two things but that the circular

[4] [1949] Ch. 434.

[5] 150 L.T. 374, 375.

is not explicit enough; that it does not go into sufficient details about the financial position of the Redlands company. There is no suggestion that there has been anything like intentional cheating or deception on the part of those promulgating this scheme and, particularly, on the part of the authors of the circular.

Without putting my own view as to how this scheme could have been improved and made a little more favourable and a little more fair, perhaps, to the ordinary shareholders, I do not think that unfairness in the sense in which it has been used in the reported cases has been established. It must be affirmatively established that, notwithstanding the view of the majority, the scheme is unfair, and that is a different thing from saying that it must be established that the scheme is not a very fair or not a fair one: a scheme has to be shown affirmatively, patently, obviously and convincingly to be unfair.

This is a difficult case, and if it goes to a higher court I would like to express my apologies for having dealt with it on somewhat vague and not very detailed lines: but, after all, if it has to be affirmatively established that the scheme is unfair, it is largely a matter of the onus of proof and whether the evidence has satisfied me.

I am not satisfied that this scheme is unfair in the sense in which Maugham J. used the words and the application ought not to succeed.

Order accordingly.

Solicitors: *Simpson, Palmer & Winder; Baileys, Shaw & Gillett.*

K. R. A. H.

In re COLLARD'S WILL TRUSTS.

LLOYDS BANK LTD. *v.* REES AND OTHERS.

1961
Feb. 23.
Buckley J.

[1960 C. No. 2412.]

Trusts—Power of advancement—Exercise of power—Statutory power—Whether power to advance land—Power of advancement excluded for purposes connected with business—Tenant of farm carrying on business of farmer—Proposed conveyance of farm to tenant for purpose of minimising death duties—Whether power to convey farm by way of advancement—Whether for purpose connected with business—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 32.

Circuity of Action—Avoiding—Equity—Power of advancement—Power to advance cash—Advancement of land approved.

Section 32 (1) of the Trustee Act, 1925, provides that "Trustees "may at any time or times pay or apply any capital money subject "to a trust, for the advancement or benefit, in such manner as they "may, in their absolute discretion, think fit, of any person entitled "to the capital of the trust property or of any share thereof, "whether absolutely or contingently . . . and whether in possession "or in remainder or reversion."

By his will a testator settled half his residuary estate on trust for his elder daughter for life on protective trusts, and subject thereto on trust for her children as should attain 21 or previously marry. Clause 7 of the will provided that "the statutory power "of advancement of capital given to my trustees by section 32 of "the Trustee Act, 1925, shall apply to the trusts hereof as if "incorporated herein save that no such advancement shall be made "to or on behalf of any beneficiary . . . for any purposes connected "with business." The testator's elder daughter, who was past the age of child-bearing, had one son who was of full age. Since 1952, a farm belonging to the estate, which had been appropriated to the elder daughter's settled share, had been occupied by her son as tenant under two tenancy agreements. The son farmed the agricultural land there by way of business and as a full-time occupation. The farm was valued at £20,000.

On a summons by the independent trustee of the will to determine whether the trustees could convey the farm to the son by way of advancement, it being deposed by the elder daughter and the son that the purpose of the proposed advancement of the farm was to minimise the estate duty prospectively payable on the elder daughter's death and that the advance would have no effect on the son's business of farmer:—

Held, (1) that the court would not insist on circuity of action if the same result could be achieved by direct action which legitimately could be achieved by more circuitous action and that, since the trustees would have had power, under the statutory power of advancement, to advance £20,000 in cash to the son and subsequently to sell the farm to him for that sum, they had power to convey the farm to the son direct and to treat that conveyance as an advancement to him of its market value.

Dictum of Neville J. in *Sprange* v. *Lee* [1908] 1 Ch. 424, 430, C.A. applied.

(2) That, on the evidence, the purpose of the advancement was the avoidance of estate duty, which was not a purpose connected with the son's business, and that the advancement was not, therefore, an advancement of the kind excluded from the trustees' power of advancement by clause 7 of the will and, accordingly, the proposed transaction was one which the trustees had power to carry out.

ADJOURNED SUMMONS.

By his will, dated February 2, 1941, the testator, Fred Collard, appointed the plaintiff, Lloyds Bank Ltd., his wife, Caroline Gertrude Collard, his son-in-law, Eric Vivian Rees, and his elder daughter, Margaret Rees, executors and trustees thereof. After giving various legacies and annuities, the testator, by clause 5 of his will, gave his residuary estate to his trustees on trust for sale and directed them to hold his residuary estate for the benefit of his wife for life on protective trusts and subject thereto to divide his residuary estate into two equal half parts. He directed that as to one such part, referred to as his elder daughter's trust fund, the trustees should hold the income of the fund for the benefit of his elder daughter during her life on protective trusts as defined by section 33 of the Trustee Act, 1925, and subject thereto that the capital and income of the fund should be held on trust for such of the children of his elder daughter as should be living at the date of his death or as should be born subsequently and should attain the age of 21 years or previously marry and if more than one in equal shares absolutely. The will then provided for certain eventualities which did not or, in the events which happened, could not happen and declared the trusts on which the other moiety of his residuary estate was to be held.

Clause 7 of the will provided: "I declare that the statutory "power of advancement of capital given to my trustees by section "32 of the Trustee Act, 1925, shall apply to the trusts hereof "as if incorporated herein save that no such advancement shall "be made to or on behalf of any beneficiary for the purpose of "acquiring a share or interest in or setting the said beneficiary "up in any business or for any purposes connected with business "excepting that my trustees may if necessary make such advancement for the purpose of paying any fees or premium required "for business education or apprenticeship."

The testator died on June 25, 1952, and probate of his will was granted on September 18, 1952, to the executors named therein, with the exception of the testator's wife who had predeceased him, dying on February 12, 1951.

The testator's elder daughter, having been born on January 5, 1900, was, at the date of the hearing, past the age of childbearing. She had one son, John Collard Rees, who was born on February 11, 1924.

By a deed of family arrangement dated December 16, 1954, it was provided, inter alia, that a farm known as Upper Townhill Farm, Southampton, purchased by the testator shortly before his death for £12,040, should be appropriated to the elder daughter's share at that price. Since March 25, 1952, the farm had been occupied by the elder daughter's son as tenant under two tenancy agreements dated October 21, 1952, at a total rent of £156 per annum; and he farmed the agricultural land there by way of business as his full-time occupation.

The value of the personalty and realty appropriated to the elder daughter's share was about £32,112 and the trustees also held realty to the approximate value of £84,000, half of which formed part of the elder daughter's fund. On February 28, 1958, investments of the aggregate value of £9,788 0s. 3d. were transferred to the elder daughter's son by way of advancement.

The trustees being desirous of vesting the freehold of the farm in the elder daughter's son if they had power to do so, the bank issued a summons on July 6, 1960, asking, inter alia, whether on the true construction of the will and in the events which had happened, clause 7 of the will authorised the trustees to convey the farm to the son in fee simple or not.

According to an affidavit sworn by the elder daughter and her son their purpose in desiring that the farm should be transferred to the son was to reduce the amount of estate duty prospectively exigible on the death of the testator's elder daughter. By paragraph 2 of the affidavit the son deposed: "I pay all rates, taxes, "occupier's drainage rates and other outgoings of an annual and "recurring nature payable in respect of the farm except land-"lord's property tax, land tax, owner's drainage rates and tithe "redemption annuities and any other landlord's outgoings. The "only immediate effect of the advancement so far as I am con-"cerned will be the cesser of my obligation to pay a total of "£156 per annum in rent and the assumption of the liability for "all landlord's repairs the burden of which has been entirely "borne by me for the past six years in order to relieve my mother ". . . ; I shall also become responsible for fire insurance premiums "amounting to about £36 per annum; there are no other out-"goings affecting the farm apart from the rates which have been "paid by me as tenant and the usual liability for income tax on "the annual value of the farm or the rent paid for the farm. "These changes will have no material effect upon my business. "I have not in mind any business transaction to which the "transfer to me of the freehold reversion of the farm has any "relevance."

At the date of the hearing the farm was of a value of £20,000.

P. S. A. Rossdale for the plaintiff bank. The bank's duty is to submit that the trustees have no power, under the power of advancement contained in clause 7 of the will, to advance the farm to the son of the testator's elder daughter; although in fact the bank and the other two trustees consider that the advance would be advantageous and they wish to make it.

The proposed advance would be within the limit of one-half of the beneficiary's share imposed by proviso (*a*) to section 32 (1) of the Trustee Act, 1925. The first question is whether the statutory power of advancement contained in section 32 can be exercised by conveying land direct to a beneficiary. There is no authority on this point. A beneficiary may purchase trust property. Neville J. said in *Sprange* v. *Lee* [1] that equity would not insist on circuity of action, so that, since it would be within the statutory power for the trustees to advance £20,000 to the son in cash and for the son to apply that sum in purchasing the farm from them, it may be that equity would allow the trustees to short-circuit the operation and transfer the land to the son direct, without going through the process of an advance of cash to the son and a purchase of the farm by him. However, Neville J. in *Sprange* v. *Lee* [1] was envisaging a case in which there was a legal obligation on each side, and there is no such obligation on either side in the present case.

Section 32 gives trustees power to "pay or apply any capital "money." Land, even when subject to a trust for sale, is not capital money. Further, one cannot "pay" land. The statutory power of advancement is often exercised by the transfer to the beneficiary of stocks and shares, which are, admittedly, not money. However, they are personalty, which is more akin to money than is land, and it is possible at any time to ascertain the value of stocks and shares quoted on the Stock Exchange.

If the statutory power can be exercised by conveying land, the question arises whether, in this particular case, the proposed advance is excluded by the provision in the will that no advance shall be made for any purpose connected with business. The son is carrying on the business of a farmer on the land, and it is submitted that the advance to him of the freehold interest in the land on which he carries on his business would be for the purpose of that business. The words "in connection with" were considered in *I. T. P. (London) Ltd.* v. *Winstanley*,[2] where Lord Goddard C.J. said there must be some nexus between the things said to be connected. The principle of construction applicable to the present case is that clear words must be used in order to interfere with existing rights of property. Therefore, if there is a doubt whether the advance would be within the power, the proper course is to say that it would not. It is clearly to the advantage of a person engaged in farming to acquire the freehold interest in the land which he farms, for it will give him security of tenure, just as it would be to the advantage of a tenant shopkeeper to acquire the freehold of the shop in which he carries on his business. If the son bought the freehold from a stranger, it is clear that the purchase would be for a purpose connected with his business of farming. Therefore, if the trustees advance the farm to him, that advance would similarly be for a purpose connected with the business.

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[1] [1908] 1 Ch. 424, 430.

[2] [1947] K.B. 422; 63 T.L.R. 70; [1947] 1 All E.R. 177, D.C.

O. M. W. Swingland for the defendants. On the first point, the trustees clearly have power, under section 32, to advance cash. They are entitled to sell trust property to a beneficiary. Therefore, they can advance cash to a beneficiary and the beneficiary may use it to purchase trust property. It follows that, under the principle that equity will not insist upon circuity of action (see *Sprange* v. *Lee* [3]), trustees may cut the corners and transfer securities or real property direct to a beneficiary in exercise of their statutory power of advancement. This is frequently done in regard to stocks and shares. The only problem in regard to land is one of valuation. It is manifest from section 32 (2) that the section applies to land held on trust for sale. If the trustees have no power to convey this farm to the son, it follows that only securities which have a value at any given moment on the Stock Exchange can be the object of this cutting the corners operation.

[BUCKLEY J. What would be the position as regards stamp duty?]

The conveyance will have to be stamped as a conveyance on sale, for the Revenue will be entitled to regard the advance as, in substance, a sale of the farm although no money, in fact, passes.

Where an advance is made, the trust is brought to an end pro tanto by the exercise of the power of advancement, but the exercise of the power does not cause a forfeiture of a protected life interest: *In re Shaw's Settlement* [4]; and see also section 33 of the Trustee Act, 1925.

On the second point, the court must look at the "purpose" of the proposed advance. If an advance is made for the purpose of a business it must be an advance which benefits the business.

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[3] [1908] 1 Ch. 424, 430.

[4] [1951] Ch. 833; [1951] 1 T.L.R. 470; [1951] 1 All E.R. 656.

The benefit conferred on the beneficiary by the advance must, if it is to fall within the prohibition, be some benefit to the beneficiary through his business. This advance would, in fact, confer no benefit on the son as a farmer. He would get no financial benefit because he would be undertaking the payment of the insurance premiums on the farm and the execution of all landlord's repairs, although, of course, he would not have to pay any rent. While the advance would give him the freehold interest in the land, the freehold interest in the land forms no part of the business and is of no advantage to it because, so long as the son farms the land properly, he has security of tenure under the Agricultural Holdings Act, 1948.

The purpose of the advance is not to benefit the farming business but to save estate duty. It is not the purpose of the advance that the son should have the freehold interest in the land, that is the advance itself. The saving of estate duty is the purpose, not merely the motive, of the advance. Similarly, where trustees advance money to pay the school fees of a beneficiary, it is not the purpose of the advance that the beneficiary should have the money, that is the advance. The purpose is the paying of the school fees. The purpose would be different if the trustees advanced cash to the son to enable him to purchase the farm from someone else. In that case the advance would be the handing over of the cash and the purpose would be the acquisition of the farm.

I. T. P. (London) Ltd. v. *Winstanley*[5] is of no assistance, being concerned with the words " in connection with " in a different context and in a penal statute to which special principles of construction apply.

Buckley J. stated the facts and continued: The first question to be considered is whether, under the statutory powers of advancement, the trustees can convey the land to the beneficiary. That power is contained in section 32 of the Trustee Act, 1925, which, so far as material, provides that " (1) Trustees " may at any time or times pay or apply any capital money sub- " ject to a trust, for the advancement or benefit, in such manner " as they may, in their absolute discretion, think fit, of any person " entitled to the capital of the trust property or of any share " thereof, whether absolutely or contingently . . . or subject to " a gift over . . . and whether in possession or in remainder or

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[5] [1947] K.B. 422.

"reversion." Subsection (2) provides: "This section applies "only where the trust property consists of money or securities "or of property held upon trust for sale . . . and such money or "securities, or the proceeds of such sale calling in and conversion "are not by statute or in equity considered as land, or applicable "as capital money for the purposes of the Settled Land Act, "1925."

The first thing to notice is that what subsection (1) authorises is that the trustees may make payments or apply capital moneys in certain ways and that primarily the power is a power to deal with cash. But it is said that a court of equity will never insist on circuity of action and that, if the trustees could properly make an advancement of cash and having done so could properly sell some part of the trust property to the beneficiary for that sum of cash, so also they can exercise the power of advancement by merely transferring property to the beneficiary without going through the process of making the cash advancement and a sale. There is no doubt that trustees constantly exercise the statutory power of advancement by transferring to beneficiaries Stock Exchange investments by way of advancement. Is there any distinction to be drawn in this respect between land and Stock Exchange investments? It is true that Stock Exchange investments are a form of property of which it is much easier to ascertain the value with accuracy than land. On the other hand, it may equally be said that Stock Exchange investments, by and large, are much more likely to fluctuate in value than land. But those are considerations which I do not think really go to the principle involved. The principle is that the court will not insist on circuity of action if the same result can be achieved by direct action which legitimately could be achieved by more circuitous action. I have been referred in this connection to an observation of Neville J. in *Sprange* v. *Lee*.[1] The facts of that case are far removed from those which I have to consider in this case and I do not propose to refer to them. But what Neville J. said is [1]: "I have thought whether I could deal with the transaction as being equivalent to payment by the husband and repayment by the wife. If that could be done, it is a principle of "equity that the court does not require unnecessary formalities "to be gone through. Consequently, where we find on one side a "debt immediately payable and on the other (say) a sale of property for a price equal to the amount of debt, it is not necessary

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[1] [1908] 1 Ch. 424, 430.

"that cheques should be exchanged in order that there may be "a discharge of the debt by a transfer of the property. But "in those cases there is always a legal obligation on either side. "I cannot introduce any such notional payment here, for this "reason (among others) that the husband had a good reason for "not paying this amount to his wife. Whether if he had paid "it she would have repaid it we do not know. But he had "obtained a covenant by his wife that she would not sue, under "which, if she sued him, she might be liable in damages." In that passage the judge does recognise that the court will not insist on unnecessary formalities where the result which it is proposed to achieve could be achieved more simply or directly. In such a case the court will allow the process to be short-circuited. In the present case, the farm has been recently valued by qualified valuers at £20,000, and an advance of £20,000 would be within the financial limit of the power of advancement which the trustees at present have, having regard to the value of the elder daughter's settled share. So far as I can see, there would be nothing wrong in the trustees making an advance in cash to her son of £20,000 and subsequently selling the farm to him for £20,000. In those circumstances, it seems to me that the court need not insist on that process having gone through; and that the right view is that the trustees have power to convey the farm to the son and treat that conveyance as an advancement to him of its market value.

However, a further question arises as a result of the terms of clause 7 of the testator's will because the son is at present engaged in farming activities on the farm. Since March, 1952, he has occupied the farm as a tenant of the trustees under two tenancy agreements dated October 21, 1952, at a rental of £156 per annum, and he farms agricultural land there by way of business. It is a full-time occupation.

He and his mother have sworn an affidavit in which they depose to the fact that their purpose in desiring that the farm should be transferred to the son is to reduce the estate duty prospectively payable on the death of the testator's elder daughter. With that end in view, they naturally want the conveyance to the son to be made at the earliest possible date so that the statutory period by which they may achieve exemption from death duties shall start to run as soon as possible. [His Lordship referred to paragraph 2 of the affidavit and continued:] The question I have to consider in this respect is whether, if the farm is conveyed to the son, it can be said that the advancement would be for any purpose connected with his business within the meaning of clause 7 of the testator's will. I felt a little doubt about this in the course of argument because it seems to me that if the son were buying the freehold reversion of his farm from some stranger to the trust, and the trustees were advancing him the necessary purchase-money, it would be difficult to say that the purchase was not one that he was making for a purpose connected with his business. But I have to look at the matter in the light of the facts of this particular case. He is the tenant of the farm paying what is clearly a very low rental. He has, at present, under the Agricultural Holdings Act, 1948, security of tenure so long as he farms the farm satisfactorily. The purchase of the freehold reversion will not, I think, really advantage him as a farmer at all. Indeed, looking at the matter purely from the point of view of his position as a farmer, it seems to me that financially he is better off as a tenant under the tenancy agreements than he would be as a freeholder acquiring the freehold at the price of £20,000.

I think that I am justified in taking the view that the purpose of this advancement is the avoidance of estate duty which it is proposed to achieve. That is not a purpose connected with the son's business. Consequently, I reach the conclusion that this is not an advancement of a kind which is excluded from the trustees' powers by the express terms of clause 7 of the will, and I think that this transaction is one which the trustees have power to carry out.

Declaration accordingly.
Plaintiffs' costs on the trustee basis and defendants' costs on the common fund basis to be paid out of the elder daughter's settled share of residue.

Solicitors: *Tarry, Sherlock & King for Townsends, Swindon.*

V. A. M.

In re BAKER (INFANTS).

[1960 B. No. 1839.]

1961
Mar. 9, 10,
13, 14, 15.

Pennycuick J.

Education—School—Attendance—School attendance order—Refusal of parent to comply with school attendance order—Children made wards of court on summons by local authority—Jurisdiction of Chancery Division to consider welfare of child—Education Act, 1944 (7 *&* 8 *Geo.* 6, *c.* 31), *ss.* 36, 37 (2).

Infant—Ward of court—Jurisdiction—Refusal of parent to comply with school attendance orders—Whether jurisdiction over children.

Crown—Prerogative—Statute, application to—Crown as parens patriae —Wardship jurisdiction of Chancery Division—Whether restricted by Education Act, 1944.

The mother of four infants between 5 and 15 years of age was convicted and fined by justices in November, 1957, for refusing to comply with school attendance orders served on her by the local education authority under section 37 of the Education Act, 1944,[1]

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[1] Education Act, 1944, s. 7: "The statutory system of public education shall be organised in three progressive stages to be known as primary education, secondary education, and further education; and it shall be the duty of the local education authority for every area, so far as their powers extend, to contribute towards the spiritual, moral, mental, and physical development of the community by securing that efficient education throughout those stages shall be available to meet the needs of the population of their area."

S. 36: "It shall be the duty of the parent of every child of compulsory school age to cause him to receive efficient full-time education suitable to his age, ability, and aptitude, either by regular attendance at school or otherwise."

S. 37: "(1) If it appears to a local education authority that the parent of any child of compulsory school age in their area is failing to perform the duty imposed on him by the last foregoing section, it shall be the duty of the authority to serve upon the parent a notice requiring him, within such time as may be specified in the notice not being less than fourteen days from the service thereof, to satisfy the authority that the child is receiving efficient full-time education suitable to his age, ability, and aptitude either by regular attendance at school or otherwise. (2) If, after such a notice has been served upon a parent by a local education authority, the parent fails to satisfy the authority in accordance with the requirements of the notice that the child to whom the notice relates is receiving efficient full-time education suitable to his age, ability, and aptitude, then, if in the opinion of the authority it is expedient that he should attend school, the authority shall serve upon the parent an order in the prescribed form (hereinafter referred to as a 'school attendance order') requiring him to cause the child to become a registered pupil at a school named in the order: Provided that before serving such an order upon a parent the authority shall, where practicable, afford him an opportunity of selecting the school to be named in the order, and if a school is selected by him, that school shall, unless the Minister otherwise directs, be the school named in the order. (3) If the local education authority are of opinion that the

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and her appeal was dismissed by quarter sessions in May, 1958. In November, 1958, the mother was again convicted and fined by the justices for refusing to comply with the orders and her appeal was dismissed by quarter sessions in February, 1959, and by the Queen's Bench Divisional Court in February, 1960. The mother persisted in her refusal to comply with the orders, and the local education authority, on May 9, 1960, took out a summons under the Law Reform (Miscellaneous Provisions) Act, 1949, asking that three of the infants, who were then between 5 and 15 years of age, be made wards of court, and that directions be given as to their education. Pennycuick J. found that the mother was not causing the infants to receive efficient full-time education as required by the Education Act, 1944:—

Held, (1) that the Education Act, 1944, had by necessary implication restricted the inherent jurisdiction of the Sovereign as exercised by the court, to the extent that it could not give any direction at variance with the Act, and that it could not prevent the making of a school attendance order, or, while such an order was in force, direct that a child should receive education otherwise than in accordance with the order.

(2) That the Act of 1944, by placing outside the jurisdiction of

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"school selected by the parent as the school to be named in a school attendance order is unsuitable to the age, ability or aptitude of the child with respect to whom the order is to be made, or that the attendance of the child at the school so selected would involve unreasonable expense to the authority, the authority may, after giving to the parent notice of their intention to do so, apply to the Minister for a direction determining what school is to be named in the order. (5) If any person upon whom a school attendance order is served fails to comply with the requirements of the order, he shall be guilty of an offence against this section unless he proves that he is causing the child to receive efficient full-time education suitable to his age, ability, and aptitude otherwise than at school."

S. 40: "(1) Subject to the provisions of this section, any person guilty of an offence against section 37 or section 39 of this Act shall be liable on summary conviction, in the case of a first offence against that section to a fine not exceeding one pound, in the case of a second offence against that section to a fine not exceeding five pounds, and in the case of a third or subsequent offence against that section to a fine not exceeding ten pounds or to imprisonment for a term not exceeding one month or to both such fine and such imprisonment. (2) It shall be the duty of the local education authority to institute proceedings for such offences as aforesaid wherever, in their opinion, the institution of such proceedings is necessary for the purpose of enforcing the duty imposed upon a parent by this Act to cause his child to receive efficient full-time education suitable to his age, ability, and aptitude, and no such proceedings shall be instituted except by or on behalf of a local education authority."

S. 76: "In the exercise and performance of all powers and duties conferred and imposed on them by this Act the Minister and local education authorities shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents."

the court the decision whether a child should receive education in accordance with a school attendance order, had equally put it outside the proper scope of the jurisdiction of the court to enforce such an order, so that the local education authority must rely on the sanctions contained in the Act. Accordingly, the infants would cease to be wards of court and no directions would be made as to their education.

In re M. (An Infant), post, p. 328; [1961] 2 W.L.R. 350; [1961] 1 All E.R. 788, C.A. applied.

ADJOURNED SUMMONS.

The mother of four infants between 5 and 15 years of age was convicted and fined by justices in November, 1957, and again in November, 1958, for refusing to comply with school attendance orders served on her by the local education authority under section 37 of the Education Act, 1944. Her appeals against the convictions were dismissed but she persisted in her refusal to comply with the orders. On May 9, 1960, the local education authority took out a summons under the Law Reform (Miscellaneous Provisions) Act, 1949, to which the father and the mother were respondents, asking that three of the infants who were then under 15 years of age be made wards of court, and that directions be given as to their education.

The facts are more fully stated in the judgment of Pennycuick J.

The summons was heard in chambers and adjourned into open court for judgment.

A. C. Sparrow for the local education authority.
W. A. Bagnall for the mother.
T. A. C. Burgess for the father.

Cur. adv. vult.

PENNYCUICK J. This is a summons taken out by the Norfolk County Council in the matter of three infants—Robin, Felicity and Wendy. The respondents are the mother and father respectively of the infants. The summons asks, first, that the infants may be made wards of the court and, second, that directions may be given as to the education of the infants. The mother and father are at present separated and the mother is living in a country district in Norfolk. Her family consists of seven children, an older son who is now aged 15, the three infants to whom the present summons relates, who are respectively 14½, 13 and 12 years of age, and three younger children.

The mother has a rooted objection of principle to sending her children to school, and has waged a prolonged defensive battle on this issue against the council as the local education authority. The council has made a succession of school attendance orders under the Education Act, 1944, resulting in a series of prosecutions before the justices. In 1954 the first prosecution was dismissed because the council had not complied in certain respects with the requirements of the Act. On November 15, 1957, the justices convicted the mother and imposed a fine of 10s. in respect of each child, the children then including the eldest son who is now past school age. The mother appealed to quarter sessions who, on May 16, 1958, dismissed her appeal.

On November 28, 1958, the justices again convicted the mother and imposed a fine of £1 in respect of each child. The mother appealed to quarter sessions, which dismissed her appeal on February 10, 1959, and in turn to the Queen's Bench Divisional Court, which dismissed her appeal on February 5, 1960.

The mother persists in her refusal to comply with the school attendance orders. These orders, as they now stand amended, require the attendance of the children at the South Dereham secondary modern school.

The council now seeks to enforce school attendance by means of these proceedings. Evidence has been filed by F. J. Earl, the administrative assistant to the education committee of the council, and the mother and father. All three have been cross-examined before me on their affidavits, and I come without hesitation to the conclusion, so far as I am concerned to do so, that the mother is not causing the children to receive efficient full-time education as required by the Education Act, 1944.

I turn now to the relevant provisions of the Act. [His Lordship read section 7, the definition of " compulsory school age " in section 35, sections 36, 37 (1) (2) (3), observed that section 37 (4) provided in effect that parents might make application for substitution of another school for that named in the order, section 37 (5), stated that section 39 was concerned with the duty of parents to secure regular attendance of a registered pupil, sections 40 (1) (2) and 76, and continued:] The effect of the provisions which I have just read is that the parent is bound to cause the child to receive efficient full-time education either by regular attendance at school or otherwise. If the local authority is not satisfied that the parent is performing this duty, the local authority, subject to certain preliminary procedure, and provided that in its opinion it is expedient that the child should attend school, must serve on the parent a school attendance order requiring the

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parent to cause the child to become a registered pupil at the school named in the order, as to which the parent has a limited power of selection. If the parent fails to comply with the requirements of the order, and is unable to prove that he is causing the child to receive efficient full-time education otherwise than at school, he is guilty of an offence and, on summary conviction for this offence, he is liable to fines of a specified progressive amount, and on the third offence, also to imprisonment.

It appears to me clear that the Education Act, 1944, has, by necessary implication, restricted the inherent jurisdiction of the Sovereign as exercised by this court, to the extent that the court could not give any direction at variance with the Act. In particular, the court could not prevent the making of a school attendance order; nor, so long as a school attendance order is in force, could the court direct that the child shall receive education otherwise than in accordance with the order—that is to say, by becoming a registered pupil and attending regularly at the school named in the order.

Mr. Sparrow, for the council, accepts, and indeed, asserts this position; but he contends that, subject only to the limitations imposed by the Act, the inherent jurisdiction of this court remains unimpaired, and that in exercise of this jurisdiction the court can give a direction, the effect of which will be to enforce the school attendance orders made by the council. That is, indeed, the whole purpose of the present application.

In my judgment, the Act, by placing outside the jurisdiction of the court the decision as to whether or not a child shall receive education in accordance with a school attendance order, has equally put it outside the proper scope of the jurisdiction of the court to enforce such an order. The court in the exercise of its inherent jurisdiction, can only properly give a direction after it has decided that the act directed to be done is for the benefit of the infant concerned: see, in this connection, the principle laid down by section 1 of the Guardianship of Infants Act, 1925.

It seems to me necessarily to follow that the court cannot properly give a direction where the decision whether the act is to be done rests with some other authority, so that the court is not itself able to decide whether or not the act is for the benefit of the infant.

Much assistance on this point is to be derived from the recent case of *In re M. (An Infant)*,[1] where a local authority had vested in itself under section 2 of the Children Act, 1948, the rights and powers of the infant's parent. The infant's foster-mother issued a summons making the infant a ward of court, and the local authority applied for an order de-warding the infant. Cross J. acceded to the application of the local authority,[2] and his decision was upheld by the Court of Appeal.

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[1] [1961] 2 W.L.R. 350; [1961] 1 All E.R. 788, C.A.

Cross J. gave his reasons, beginning with the sentence[3]: "I agree; but, viewing the matter for the moment as free from "authority, I think that the provisions of this Act to which I have "referred lead inevitably to the conclusion that the prerogative "has been restricted," and ending with the sentence: "So long, "therefore, as the local authority is acting within the powers "given to it by the Act, this court, as I see it, has no right, let "alone any duty, to inquire into the wisdom of their decisions."

Lord Evershed M.R., with whom the other members of the Court of Appeal agreed, said[4]: "On those premises, that is to "say in the absence of any challenge as to the propriety of what "the local authority or its officers have done, as distinct from "their wisdom, I feel compelled by the clear indication of the "language to which I have alluded in the statute, to conclude "that this matter of judging the present best interests of the "child in the circumstances of this case has been placed by "Parliament in the exclusive jurisdiction of the local authority. "Mr. May conceded that on the premises as I have stated them "the onus would be heavy upon him to persuade the Chancery "courts to override or disregard the conclusions of the local "authority. But that argument and that concession appear to "me to involve Mr. May in something of a dilemma. For the "purposes of deciding the immediate questions which now have "been raised, either the prerogative jurisdiction survives and "exists, or it does not; and if it does survive and exist, then the "decision as to what now is in the best interests of the child "must rest not with the local authority but with the court. "There seems to me to be no escape from that result."

Towards the end of his judgment the Master of the Rolls said[5]: "It may perhaps be useful for me to add by way of "summary the following: (1) The prerogative right of the Queen, "as parens patriae in relation to infants within the realm, is not "for all purposes ousted or abrogated as the result of the exercise

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[2] Ante 81; [1960] 3 W.L.R. 1045; [1961] 1 All E.R. 201.

[3] Ante 81, 86.

[4] [1961] 2 W.L.R. 350, 357.

[5] Ibid. 360.

"of the duties and powers by local authorities under the "Children Act, 1948: in particular the power to make an infant "a ward of court by invocation of section 9 of the [Law "Reform (Miscellaneous Provisions) Act, 1949] is unaffected.

"(2) But even where a child is made a ward of court by virtue "of the Act of 1949, the judge in whom the prerogative power is "vested will, acting on familiar principles, not exercise control "in relation to duties or discretions clearly vested by statute in "the local authority, and may, therefore, and in a case such as "the present normally will, order that the child cease to be a "ward of court. This result will occasion no surprise to those "familiar with wardship proceedings, for in many cases where "infants are made wards of court, the directions of the court are "sought only on particular matters, such, for example, as the "place of education or to control the activities of the infant in "relation to marriage or undesirable associations where united "parental control has failed; in such cases the court makes no "order as to the custody, care or maintenance, for that remains "in the hands of unimpeachable parents and the court does not "interfere in relation to such matters.

"(3) There remains the right (and duty) of the judge in whom "the prerogative power is vested, to control the activities of a "local authority in cases where the local authority is shown to be "acting in some way in breach or in disregard of its statutory "duties."

Those passages which I have read, although addressed to an entirely different situation under a different Act, appear to me to be directly in point as to the principles to be applied in the present case. Mr. Sparrow, for the council, sought to meet this difficulty in a number of ways.

First, he contended that this court, although precluded by the Education Act, 1944, from making a decision as to whether the children should receive education in accordance with the school attendance orders made under the Act, may yet consider whether such compliance would be for the benefit of the children, and, if satisfied that it is so for the benefit of the children, may enforce the school attendance orders.

I find the greatest difficulty in the conception that this court can, or should, conduct an independent inquiry of this kind into a matter the decision upon which has been entrusted to the local authority; and I think that in any case that contention cannot be reconciled with the statements which I have just quoted from the judgment in *In re M. (An Infant)*.[6]

Secondly, he contended that this court is bound to assume that compliance with the school attendance orders was for the benefit of the children concerned. No doubt the Act was passed in what Parliament conceived to be the interests of children generally; but Parliament legislates for the community as a whole, and I do not think there is anything in the Act or in the general law which entitles the court to assume that its provisions are necessarily for the benefit of every particular child between the ages of five and fifteen.

Thirdly, he contended, with truth, that the Act has by no means wholly excluded the parent from control of his children's education; and he referred to the general provision in section 76, and more particularly, to the limited power contained in section 37. Therefore, he said, the jurisdiction of the court stands unimpaired to a corresponding extent. But that contention does not meet the present point—namely, that the court is being asked to enforce school attendance orders, as to the operation of which the court has no discretion at all.

It may be that these specific contentions do not do justice to the forceful argument of Mr. Sparrow on behalf of the council. In broad terms, he urges that these children are in jeopardy, and that the court ought to come to their rescue. I feel much sympathy with this plea; but the court can only act within its proper jurisdiction, and it seems to me that I am not entitled to stretch that jurisdiction in order to meet the unusual circumstances of the present case. Indeed, it would be a dangerous precedent to do so.

I have been referred to *Attorney-General* v. *Bastow*,[7] and in particular to the statement of Devlin J. to this effect[8]: "However, I think it must be a matter of administrative discretion "whether the enforcement of the law, in the face of someone "who is determined to defy it, is best achieved by going to the "police court in a series of applications of that nature, or by "going to the High Court and asking it to use its powers, which "would amount to the imposition, if necessary, of an indefinite "sentence until such time as the defendant has purged his "contempt."

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[6] [1961] 2 W.L.R. 350.

[7] [1957] 1 Q.B. 514; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.

[8] [1957] 1 Q.B. 514, 522.

But there is, I think, a vital difference between an application to enforce a public right, such as was the position in that case, and an application to the inherent jurisdiction of this court to protect the interests of particular infants.

For the reasons given above, I have come to the conclusion that enforcement of these school attendance orders lies outside the proper function of this court, and that the council must rely upon such sanctions as are contained in the Act itself.

I should like to make it clear that I am not intending to express the slightest agreement with the mother's views as to the education of children in general, or of her own children in particular. Equally, I am not intending to express the slightest disagreement with the views expressed by the Norfolk justices or the Queen's Bench Divisional Court. On the contrary, as I have already said, I, too, have come to the clear conclusion that the mother is not causing her children to receive efficient, full-time education as required by the Act.

I must refer, in conclusion, to one further contention advanced by Mr. Bagnall for the mother, and by Mr. Burgess for the father—namely, that the present application is ultra vires the council. I do not think that contention takes me any further. If I am right in my view that the court cannot properly make an order such as that sought by the council, then obviously the application fails on that ground. If, on the other hand, the court could properly make the order, then it seems to me that the council would have power to make the application as being incidental to, or consequential upon, the exercise of its powers under the Act.

I propose, therefore, to direct that the children cease to be wards of court and not to make any direction as to their education.

Direction accordingly.
Summons dismissed with costs, father's costs to be separately taxed for purpose of Legal Aid and Advice Act, 1949.
Leave to appeal if required.

Solicitors: *Sharpe, Pritchard & Co. for F. P. Boyce, Norwich; Piesse & Sons for Russell Steward, Stevens & Hipwell, Norwich; Field, Roscoe & Co. for Sadler, Lemmon & Gethin.*

M. G. T.

1961
March 20, 23.

Buckley J.

In re P. C. (An Infant).

[1960 C. No. 1457.]

Infant—Ward of court—Costs—Official Solicitor as guardian ad litem of ward—Wardship proceedings—Whether costs of Official Solicitor payable by parents of ward—Supreme Court Costs Rules, 1959 (*S.I.* 1959, *No.* 1958, *Sch.* 2), *rr.* 2 (5), 3 (2).

On April 20, 1960, a father issued an originating summons, to which the mother was sole respondent, asking that their infant daughter be made a ward of court and that a man named in the summons be restrained from marrying her. On the same day an ex parte injunction was granted restraining the man and the infant from inter-marrying, associating or communicating with one another until April 26 or further order. On April 22 the father applied by motion for an order committing the man for contempt for his breach of the injunction, and, by another motion, for an injunction restraining the man and the infant from inter-marrying, associating or communicating with one another until further order. At an adjourned hearing of the two motions on May 6, Buckley J. decided that the infant should be advised and represented by the Official Solicitor as her guardian ad litem. Following a further hearing on May 20, which the Official Solicitor attended on behalf of the infant, the summons was amended to make both parents applicants and the infant and the man respondents. On a notice of motion served on May 25 by the parents on the infant and the Official Solicitor as her guardian ad litem Buckley J. gave directions as to the infant's residence. On June 9 the Official Solicitor entered an appearance on behalf of the infant to the summons of April 20. The two motions of April 22 were adjourned on June 16 for further evidence but before any further hearing took place the infant and the man left the country and were married without the consent of the court in a foreign jurisdiction.

On a summons taken out by the Official Solicitor for an order [1] that his costs incurred in the performance of his duties as guardian ad litem of the infant, including therein his costs relating to the two motions of April 22, and to the motion of May 25, be taxed and the certified amount be paid to him by the infant's parents:—

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[1] Supreme Court Costs Rules, 1959, r. 2 (5): "The powers and "discretion of the court as to costs "under section 50 of the Supreme "Court of Judicature (Consolidation) "Act, 1925 (which provides that the "costs of and incidental to proceed-"ings in the Supreme Court shall be "in the discretion of the court and "that the court shall have full power "to determine by whom and to what "extent the costs are to be paid), and "under the enactments relating to "the costs of criminal proceedings to "which these rules apply, shall be "exercised subject to and in accor-"dance with these rules."

R. 3 (2): "If the court in the "exercise of its discretion sees fit to "make any order as to the costs of "or incidental to any proceedings, "the court shall, subject to these "rules, order the costs to follow the "event, except when it appears to "the court that in the circumstances "of the case some other order should "be made as to the whole or any "part of the costs."

Held, that the infant's parents were in the position of plaintiffs to an action, and that, as the appointment of the Official Solicitor as guardian ad litem of the infant was necessary for the proceedings, the court in the exercise of its discretion under rule 3 (2) of the Supreme Court Costs Rules, 1959, would order that the costs of the Official Solicitor, including those relating to the two motions to which the infant was a respondent, namely, the motion of April 22 for an injunction against the infant, and the motion of May 25, be taxed and the certified amount be paid to the Official Solicitor by the parents, but that no order would be made as to the motion of April 22 for committal of the man since the infant was not a party to those proceedings.

Eady v. *Elsdon* [1901] 2 K.B. 460, C.A. applied.

ADJOURNED SUMMONS.

By an originating summons under the Guardianship of Infants Acts, 1886 and 1925, and the Law Reform (Miscellaneous Provisions) Act, 1949, issued on April 20, 1960, a father asked that his infant daughter, aged about 18, be made a ward of court and that a certain man named in the summons be restrained from marrying her; the mother of the infant was the only respondent to the summons. On the same day the vacation judge granted an ex parte injunction restraining the man and the infant until April 26, 1960, or until further order, from marrying, associating or having any communication or intercourse with one another. On April 22, 1960, the father of the infant applied by motion for an order committing the man for contempt for his breach of the ex parte injunction and, by another motion, for an injunction restraining the man and the infant from inter-marrying, associating or having any communication or intercourse with one another until further order. The two motions were first heard on April 26, but were adjourned to May 6, when, since the infant was some 18 or 19 years old and was not represented or receiving independent legal advice, Buckley J. took the view that she should be advised and represented by the Official Solicitor as her guardian ad litem.

The motions were heard again on May 20 when the Official Solicitor attended on behalf of the infant but had not instructed counsel; Buckley J. intimated that he thought that the originating summons should be amended to make the infant and the man respondents, and on June 3 that amendment was made and the mother of the infant was made an applicant with the father. On May 25 the infant's parents served a notice of motion on the infant and the Official Solicitor as her guardian ad litem in which they asked that directions should be given as to the residence of the infant. At that time she was not living with her parents and the Official Solicitor had not thought it desirable to disclose her whereabouts to them without the direction of the court. Buckley J. gave directions which resulted in the parents being told of the infant's whereabouts and the infant remaining where she was upon certain terms.

On June 9 the Official Solicitor entered an appearance to the originating summons of April 20 on behalf of the infant. On June 15 and 16 the two motions of April 22 again came before Buckley J. who indicated that, if the court were sufficiently satisfied that the man were able to provide financially for the infant, it might properly give its consent to their marriage. At the hearing the man said that he had good prospects of obtaining employment abroad, but as he wished to be satisfied as to the reality of those prospects, Buckley J. stood the proceedings over to enable the man to produce evidence to that effect. In fact, the matter never came before the court again as the infant and the man left the country to live abroad, and were married in a foreign jurisdiction without the consent of the court.

The Official Solicitor took out a summons for an order that his costs incurred in the performance of his duties as guardian ad litem of the infant, including therein his costs relating to the three motions, the two dated April 22, 1960, and that dated May 25, 1960, and of the present summons be taxed and the certified amount be paid to him by the infant's parents.

The summons was heard in chambers and adjourned into open court for judgment.

W. J. C. Tonge for the Official Solicitor.
Michael Essayan for the parents.

BUCKLEY J. stated the facts substantially as set out above and continued: In these circumstances the Official Solicitor wants to have his costs provided by the parents. It is submitted on his behalf that any plaintiff who starts proceedings against or relating to an infant, in which it is right that the infant should be made a party, cannot proceed therein without a guardian ad litem being appointed for the infant; and that if no one else is prepared to act as guardian ad litem, and it is necessary to seek the assistance of the Official Solicitor, the plaintiff must pay for the privilege of having the assistance of the Official Solicitor to act as guardian ad litem of the infant defendant.

First I should refer to R.S.C., Ord. 65, r. 13, as it stood in the Rules of the Supreme Court published in the Annual Practice, 1960. That rule, which has since been rescinded, provided: "Where the court or a judge appoints one of the solicitors of "the court to be guardian ad litem of an infant or person of "unsound mind, the court or judge may direct that the costs to "be incurred in the performance of the duties of such office shall "be borne and paid either by the parties or some one or more "of the parties to the cause or matter in which such appointment "is made, or out of any fund in court in which such infant or "person of unsound mind may be interested, and may give "directions for the repayment or allowance of such costs as the "justice and circumstances of the case may require." Broadly speaking, that rule left the question of the Official Solicitor's costs in the discretion of the court.

The position is now governed by the Supreme Court Costs Rules, 1959, which are to be found in the Annual Practice, 1961, at p. 1832. Rule 2 (5) provides: "The powers and discretion of "the court as to costs under section 50 of the Supreme Court of "Judicature (Consolidation) Act, 1925 (which provides that the "costs of and incidental to proceedings in the Supreme Court "shall be in the discretion of the court and that the court shall "have full power to determine by whom and to what extent the "costs are to be paid), and under the enactments relating to the "costs of criminal proceedings to which these rules apply, shall "be exercised subject to and in accordance with these rules." Rule 3 (2) provides: "If the court in the exercise of its "discretion sees fit to make any order as to the costs of or "incidental to any proceedings, the court shall, subject to these "rules, order the costs to follow the event, except when it "appears to the court that in the circumstances of the case some "other order should be made as to the whole or any part of the "costs." There is no rule corresponding to R.S.C., Ord. 65, r. 13, specifically dealing with the costs of the Official Solicitor when he is appointed guardian ad litem. The new rules, I think, leave the question of costs as freely in the discretion of the court as they were under the old rules.

I should now refer shortly to the authorities to which my attention has been drawn. In *Eady* v. *Elsdon*,[1] where a plaintiff sued an infant defendant for damages, no appearance was entered for the infant, and on the plaintiff's application the Official

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[1] [1901] 2 K.B. 460, C.A.

Solicitor was appointed his guardian ad litem. The plaintiff succeeded in the action, and was ordered to pay the costs of the Official Solicitor as guardian ad litem to be taxed by the taxing master. The order did not specify whether those costs were to be taxed as between solicitor and client or party and party. Upon the taxing master taxing the costs on the party and party basis, the Official Solicitor objected to the taxation. That objection came before Grantham J.[2] who allowed the Official Solicitor's objections; that is to say, he intimated that by reason of the peculiar position of the Official Solicitor, he was entitled to an indemnity, and that he ought to have his costs on a solicitor and client basis. On appeal from the order of Grantham J. the Court of Appeal[3] pointed out that where the court orders any party to pay costs without saying on what basis those costs are to be taxed, they ought to be taxed on a party and party basis. There was, however, another point in that case: some evidence had been called by the Official Solicitor on behalf of the infant defendant which had not persuaded the judge to the view of the facts which the evidence was directed to establish, and the taxing master disallowed the Official Solicitor's costs relating to that issue because, he said, the Official Solicitor had failed on that part of the case. On that point the Court of Appeal said that the Official Solicitor was entitled to be paid his costs as though he were a successful party. That case, therefore, establishes the proposition that where a plaintiff secures the appointment of the Official Solicitor as guardian ad litem of an infant defendant the plaintiff is liable to be ordered to pay the Official Solicitor's costs as though the Official Solicitor has succeeded even though, in the event, the plaintiff succeeds in the action. The Court of Appeal did not seek to criticise in any way the order originally made at the trial which did not require the Official Solicitor's costs to be taxed on a solicitor and client basis. In the result, therefore, the Official Solicitor received his costs on a party and party basis as though he had been a successful party, although in fact the infant had not been successful.

The next case is *Goatly* v. *Jones*,[4] an action to set aside a settlement executed by a certain Mr. and Mrs. Jones. The plaintiff was the trustee in bankruptcy of Mr. Jones, and the infant children of the marriage had been made defendants in the action. At the trial the court held that the settlement was void against the plaintiff so far as it comprised the property of the bankrupt, but valid so far as it comprised the property of Mrs. Jones. The costs of the Official Solicitor as guardian ad litem of the infant defendants were ordered to be taxed and paid by the plaintiff, who was to add them to the costs which Mr. and Mrs. Jones were ordered to pay. There was then some discussion about the form of the order in respect of the Official Solicitor's costs; counsel for the plaintiff said that it was the settled practice to tax them as between party and party unless a special direction was given to the contrary, and that the plaintiff as trustee in bankruptcy could not consent to a solicitor and client taxation, but that he would not object to the order being in the terms of R.S.C., Ord. 65, r. 13, that is to say, that the plaintiff should pay the costs of the guardian ad litem incurred in the performance of the duties of such office. Counsel for the Official Solicitor accepted that, and accordingly Neville J. directed that the order should be made in that form.

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[2] Unreported.

[3] [1901] 2 K.B. 460, 467, C.A.

[4] [1907] W.N. 161.

That was followed by *Jackson* v. *Jackson.*[5] More recently, in *Gillette Safety Razor Co. and Gillette Safety Razor Ltd.* v. *Franks*[6] where the defendant was an infant, Astbury J., whose attention had not, I think, been drawn to either of the last two mentioned cases, gave the Official Solicitor his costs on a solicitor and client basis.

It seems to me that when the parent of an infant whom he or she is unable to control to his or her own satisfaction comes to the court to obtain the assistance of the court, and when the case is a proper one for the infant to be made a party to the proceedings—more particularly when, as in the present case, one of the earliest steps in the proceedings is an application by motion for an injunction restraining the infant from doing some act—such an applicant is really in the position of a plaintiff in an action suing an infant defendant. It is quite true that it is common practice in these cases not to make the infant a respondent to the summons in the first instance, and it is also very commonly the case that at an early stage in the case the infant becomes a respondent to the summons; in the present case the infant was from the beginning a respondent to the motion for an injunction. It is also true that in the present case the suggestion that the Official Solicitor should act as guardian ad litem of the infant originated not from the applicant, but from the court; but I do not think that that really makes any difference. It was necessary that the infant should be represented

[5] [1908] P. 308; 24 T.L.R. 674.

[6] (1924) 40 T.L.R. 606; 41 R.P.C. 499.

by a guardian ad litem for the purpose of these proceedings and it appeared that the only person suitable and available was the Official Solicitor. The appointment of the Official Solicitor as guardian ad litem was, therefore, a sine qua non to the proceedings going on and being effectively disposed of. In those circumstances it appears to me that the principle which is indicated by such cases as *Eady* v. *Elsdon* [7] is applicable to cases of this kind.

The way in which the merits of the case lie, namely, whether the parents are right in their view, or whether the infant is justified in whatever view he or she may have adopted, does not really enter into the matter. If the parents are not justified in their attitude, of course, that is all the more reason for saying that they should pay the costs incurred by other people in proceedings which they have commenced. But even if they were quite justified in their attitude, as the plaintiff in *Eady* v. *Elsdon* [8] was justified in his attitude, in my view they must bear the costs incidental to the infant being properly advised and represented.

It has been suggested by Mr. Essayan, who appears here on behalf of the parents, that I should indicate that the costs of the Official Solicitor should be borne in the first instance by the young man in question and only to the extent that they are not satisfied from that source by the parents. I do not think that I could do that, partly because he is not before me on this summons and, therefore, is not in a position to argue the matter before me, partly because I understand, although I have not any detailed information, that he is legally aided, and partly, also, because it seems to me that this principle proceeds upon the basis that a plaintiff who sues an infant is prima facie the person who is responsible for costs of this nature, although it may be that he may have a right to recover them from someone else. I do not think, therefore, that I could throw the burden of these costs on the young man in the first instance as is suggested, and only to the extent that that order might turn out to be inadequate upon the parents.

I propose to direct that the costs of the Official Solicitor incurred in the performance of his duties as guardian ad litem of the infant, including in that his costs relating to the motion of April 22, 1960, which asked for an injunction against the infant, and his costs of the motion of May 25 relating to the residence of the infant, be taxed and paid by the applicants. That does not include the costs of the motion of April 22, 1960, the motion for committal of the young man, because the infant was not a respondent to that motion; and I do not think that even if I did order the Official Solicitor's costs relating to that motion to be taxed, there could be any such costs; the taxing master, I think, must necessarily disallow them because the infant was not a party to that motion.

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[7] [1901] 2 K.B. 460.

[8] Ibid.

Order accordingly.
Parents to pay costs as between party and party.

Solicitors: *Official Solicitor; Donald Silk & Co.*

M. G. T.

In re NEW TIMBIQUI GOLD MINES LTD.

[No. 001171 of 1960.]

1961
Feb. 20, 21.

Buckley J.

Company—Register—Name struck off register—Application "by member "or creditor" to restore—Petitioner not member or creditor when company struck off—Bearer shares acquired by and debts assigned to petitioners after dissolution—Whether "member or creditor"—Whether entitled to petition for restoration—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 353 (6).

In 1955, the registrar of companies, pursuant to section 353 of the Companies Act, 1948, struck the name of a company off the register of companies. The petitioners, at that date, were neither members nor creditors of the company. In 1959, the first petitioner acquired a number of bearer shares in the company and, in 1960, debts due from the company were assigned to both petitioners.

On a petition, under section 353 (6)[1] of the Act of 1948, to restore the name of the company to the register of companies:—

Held, that, in order to qualify as a "member or creditor" of a company within the meaning of section 353 (6), the petitioner must show that he was a member or creditor of the company at the date when the company was dissolved, and that anyone, whether in ignorance or otherwise of the dissolution of the company, who purported to become a member or creditor of the company after its dissolution was not within the subsection. The petitioners, therefore, were not entitled to apply to the court for the name of the company to be restored to the register.

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[1] Companies Act, 1948, s. 353 (6): "If a company or any member or "creditor thereof feels aggrieved by "the company having been struck off "the register, the court on an appli-"cation made by the company or "member or creditor before the ex-"piration of twenty years from the "publication in the Gazette of the "notice aforesaid may, if satisfied "that the company was at the time "of the striking off carrying on busi-"ness or in operation, or otherwise "that it is just that the company be "restored to the register, order the "name of the company to be restored "to the register . . ."

PETITION.

A company, New Timbiqui Gold Mines Ltd., was incorporated in 1905 with the object of acquiring and taking over as a going concern the undertaking of Timbiqui Gold Mines Co. Ltd. and the assets and liabilities of that company and to acquire any concessions, grants, rights, powers, privileges, claims or contracts from any company, state, sovereign or authority which might seem to the company capable of being turned to account and to work, develop, carry out, exercise and turn to account the same. The share capital of the new company was £200,000 divided into 200,000 shares of £1 each, of which 194,678 were issued and fully paid. 75,387 of those shares were held by share warrants to bearer in denominations of 1, 5, 10 and 25 shares. The remainder of the issued shares were registered shares.

The company acquired certain mining property at Timbiqui in the Republic of Colombia in South America from the liquidator of Timbiqui Gold Mines Co. Ltd. together with certain mining rights. These rights were free of all payments in the nature of mining taxes and royalties by virtue of a composition made by the predecessors of the company with the Government of Colombia.

The registered office of the company was in England but its principal place of business was in Paris and the directors were, at all material times, resident in France. The register of members of the company was destroyed by enemy action in 1940. The rights of the company to its land in Timbiqui were confirmed by a judgment of the Supreme Court of Justice in Colombia in 1942.

In 1944, bankruptcy proceedings were instituted against the company in Colombia. The debts admitted by the competent court in Colombia, the Court of Cali, amounted to 40,000 pesos for Government taxation and 380,000 pesos for other debts.

In August, 1955, the registrar of companies, pursuant to section 353 of the Companies Act, 1948, struck the name of the company off the register of companies.

In September, 1959, the first petitioner, Albert Rodolphe Modiano, acquired 5,894 bearer shares and he also claimed to have acquired and be entitled to a further 42,643 bearer shares.

In 1960, the first petitioner and the second petitioner, Etablissement Forrestal Industrial Development, acquired the debts of 380,000 pesos admitted in the company's bankruptcy, the first petitioner as to 20,000 pesos and the second petitioner as to 360,000 pesos.

In December, 1960, the petitioners petitioned the court for an order that the name of the company might be restored to the register of companies. The petition stated, inter alia, that the company had never had sufficient capital to exploit its properties in Colombia properly, that during the 1939–45 war its position was difficult since it was cut off from its head office and that ultimately it was unable to pay a number of debts incurred in Colombia, with the result that the bankruptcy proceedings were taken against it in 1944. The petition further stated that the persons who were in control of the company at the date when its name was struck off the register were well aware of the fact that the registrar proposed to strike off its name but that the petitioners had no such knowledge, and that they first became aware that the company had been struck off " at the beginning " of the year 1959." The petition also stated that the petitioners believed that, if the company's name was restored to the register and certain arrangements were carried out, the company would be able to regain control of its properties and carry out operations thereon to the great advantage of its creditors and shareholders. The petition alleged that, at the time of its name being struck off, the company was carrying on business and in operation, that the petitioners felt aggrieved by the striking off and that it was just and equitable that the company's name should be restored to the register.

Kenneth Mackinnon Q.C. and *Raymond Walton* for the petitioners. Section 353 (6) refers to " a company or any member " or creditor thereof " feeling aggrieved by the company's name having been struck off the register. On its name being struck off the register, however, the company is dissolved, so that, at the date when the petition is heard, strictly speaking, there is no company, nor are there any members or creditors thereof. Section 353 (6), therefore, requires one to assume that there is a company when there is not, and that there are members and creditors thereof when there are not. Once this assumption is made, the words of section 353 (6) are apt to cover the case of a person who takes a transfer of shares or acquires a debt after the company's name has been struck off the register. It is submitted that it is immaterial when the member acquired his shares or the creditor his debt. The question is whether or not the petitioner is aggrieved by the company's name having been struck off the register, and the moment when he must feel aggrieved is the moment when the petition comes before the court. He does not have to have felt aggrieved at the time when the company's name was struck off the register. The petitioners have deposed that they do feel aggrieved by the company's name having been struck off, although it happened before they had acquired their shares and debts.

The object of section 353 (6) is that, if an order is made restoring the company's name to the register, the position should be the same as it would have been if the company's name had never been struck off. If someone bought registered shares in a company and his name was duly entered on the register of members in respect of those shares by the proper officer of the company, and the company's name had, unknown to anybody, previously been struck off the register, the transferee of the shares ought to be able to petition the court under section 353 (6). The same applies to a person who acquires bearer shares in good faith after the company's name has been struck off the register.

The statement in the affidavit of the first petitioner in support of the petition, that he knew of the dissolution of the company at the beginning of 1959, which was before he bought the shares, is incorrect. He did not know that the company had been dissolved until after he had bought the shares.

This is a proper case for the exercise of the court's discretion to restore the company's name to the register; the discretion should be exercised in favour of anybody who is capable of petitioning under section 353 (6) where there are assets which could, if the company were restored, be developed for the benefit of the company. There is clear evidence that that is so in the present case and that the value of those assets would be adversely affected if, as a condition of restoring the company, an immediate winding-up order was made. There is no reason why the court should decline to aid the petitioners on the ground that they acquired their shares and debts as a speculation. They are not the only persons who would benefit from the restoration of the company—other members and creditors of the company would also benefit. The loss of the register of members of the company creates no difficulty because the evidence available is sufficient for the new board of the company, if restored, to open a new register of members. The company has, at present, neither directors nor a secretary, so there is nobody who could undertake to make the annual returns which have not been made. However, the petitioners' solicitors have prepared returns and are willing to lodge those returns and to give an undertaking to the court to use their best endeavours to procure that proper returns are filed by the company when reconstituted.

E. Blanshard Stamp for the registrar of companies. The registrar's main concern is with the position in regard to the annual returns and the register of members of the company. It is, however, submitted that section 353 (6) only refers to persons who were members or creditors of the company at the time when its name was struck off the register of companies. It is true that, inasmuch as the company can petition under section 353 (6), the company itself is deemed to be in existence after it has been dissolved. The same applies to members and creditors who were members or creditors of the company when its name was struck off, for they also can petition under section 353 (6). The company is treated as still in existence and the members and creditors are treated as members and creditors of an existing company, but that does not mean that the company continued in existence after its dissolution. Persons who buy shares in a company after its dissolution cannot be regarded as members of that company because there is no contract of membership between them and the company. The members of a company are defined in section 26 of the Companies Act, 1948, as persons who have entered into a contract of membership and are on the register of members. A person who buys shares after the dissolution of a company makes a contract with a non-existent person and that contract is a nullity. Further, so far as registered shares are concerned, after the company has been dissolved there is no officer of the company competent to put the transferee's name on the register of members.

As the evidence now stands, the first petitioner has deposed that he acquired his shares in September, 1959, and that he had become aware that the company had been dissolved at the beginning of 1959. So far as the shares are concerned, a person who acquires shares in a company which he knows has been dissolved cannot say he is aggrieved by its dissolution. Not one original shareholder in or creditor of the company has appeared in support of the petition. The de facto directors of the company at the date when its name was struck off were well aware that that was going to be done. So far as the debts are concerned, they must be statute-barred, for the company became bankrupt in 1944–45.

It may be possible for someone to make the necessary annual returns, but accurate returns setting out the names and addresses of the members cannot be made without an immense amount of investigation. If the company's name is restored to the register and it fails to make the returns, the registrar cannot strike its name off again if he has reason to believe that it is carrying on business. In those circumstances, all he could do would be to take proceedings against the directors of the company, and those directors would be out of the jurisdiction, for this company is, for all practical purposes, a French company.

Buckley J. stated the facts and continued: I have to consider first of all whether the petitioners are persons who are entitled to petition the court for restoration of the company's name under section 353 (6) of the Companies Act, 1948; and, secondly, if they are, whether this is a case in which the court ought to exercise its discretion under that section to restore the name of the company to the register.

Section 353 provides machinery whereby the registrar of companies, if he has reasonable cause to believe that a company is not carrying on business or in operation, after making certain inquiries directed by the section, may strike the name of the company off the register, and when he does that the company thereupon becomes dissolved. Subsection (6) provides: "If a "company or any member or creditor thereof feels aggrieved by "the company having been struck off the register, the court on "an application made by the company or member or creditor "before the expiration of twenty years from the publication in "the Gazette of the notice aforesaid may, if satisfied that the "company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company "be restored to the register, order the name of the company "to be restored to the register . . ." The subsection further provides that "upon an office copy of the order being delivered "to the registrar for registration the company shall be deemed to "have continued in existence as if its name had not been struck "off . . ." The opening words of the subsection refer to a company or a member or creditor feeling aggrieved by the company having been struck off the register, which creates a somewhat artificial state of affairs in which it has to be assumed that the company or some member or creditor thereof can still be properly so described although the company has been struck off the register

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and consequently has become dissolved. It is one of the anomalies of company law that a company which has been dissolved can petition the court under this section to have its name restored to the register. The opening words of the subsection clearly relate to a date after the company has been struck off and, therefore, they necessarily involve some latitude in the construction of the reference to "a company or any member or creditor "thereof."

How ought those words properly to be construed? Mr. Mackinnon for the petitioners says that the subsection presupposes that there is a company and members or creditors in existence notwithstanding that the company has been struck off and that there is no reason to restrict that language to persons who were members or creditors of the company at the date when it was struck off; but that it is legitimate and it would be sensible to construe the language so as to extend to persons who have become members or creditors of the company since the company has been struck off, in this sense, that if the company had not been struck off, having regard to the course of events which in fact occurred, the particular person would have been a member or would have been a creditor of the company. He says that the object of this subsection, where an order is made, is to abrogate the effect of the action of the registrar in striking the company off the register and to produce a position such as would have been the position if the company had always continued in existence and had never been struck off the register and, therefore, become dissolved. He says: imagine the case of a transfer of registered shares after the company has been struck off but at a time when nobody had appreciated the fact—the transfer duly registered by the officers of the company and everything done apparently with due regularity but for the fact that unknown to everyone the company had been struck off by the registrar. He says that the transferee ought to be entitled under this subsection to come to the court and petition to have the company put back on the register in order that he may have the benefit of the shares and the rights attached to them which he has acquired in good faith. He says, moreover, that the same position would apply in the case of bearer shares where bearer shares were transferred in good faith by delivery after the company was struck off and with every intention to constitute the transferee of those shares a member of the company in respect of his shares.

I think there is a good deal to be said in favour of that point of view when one considers the policy adopted in the subsection. On the other hand, Mr. Stamp, who has assisted me by presenting the argument on the other side, has said that no one can become a member of a company which no longer exists—that under section 26 of the Act, apart from subscribers to the memorandum, a person only becomes a member of a company if he has agreed to become a member of the company and his name has been entered on the register, and there cannot be any such agreement where the company is no longer in existence. He also says that such a person could never properly be put on the register as there would not be anybody qualified to put his name on the register. In the case of bearer shares, there would be no company of which the holder of the bearer shares could be deemed to be a member. It seems to me clear that nobody could become a creditor of a company after the company had ceased to exist; one cannot become a creditor of a non-existent debtor. But that is not the position of the creditors here, as I understand it, because they claim to be creditors as assignees of debts which accrued before the company was struck off. The position in this respect seems to be that the original creditor, although he might be a person who was a creditor within the meaning of this section, would still not in law be a creditor of the company when the company had become dissolved, and it is debatable whether he could assign the debt to anybody else.

It seems to me the subsection involves some degree of make-believe and the question is how far the make-believe ought to be carried. Should you treat as continuing to be members or creditors people who were at some time undoubtedly members, just as the company before its dissolution was a company which is to be treated as still in existence, or should the make-believe extend to include persons who purport to have become members or creditors after its dissolution? On the whole, I think that the right way to approach this sort of problem of construction is to adopt that interpretation which would give a working effect to the subsection without extending the operation of inference or imagination further than is necessary for that purpose. Although I think the point is a difficult one, I reach the conclusion that, in order to qualify to be a petitioner under this subsection, the petitioner must show that, at the date when the company was dissolved, he was a member or a creditor; and that anyone who, whether in ignorance of the dissolution of the company or otherwise, purports to become a member or creditor of the company afterwards is not a member or a creditor within the subsection.

If, however, I were wrong on that point, I should have to consider whether the petitioners here acquired the characters in which they purport to petition with or without knowledge of the fact that the company had been struck off the register. Mr. Mackinnon tells me that the first petitioner acquired his shares in September 1959, and that he and the other petitioner acquired their debts some time in 1960, and the petition as it stands alleges: "Your petitioners first "became aware that the company had been so struck "off at the beginning of the year 1959." If that were right, I see great force in the argument which Mr. Stamp has put forward that no one can say he is aggrieved by the company having been struck off the register if he subsequently acquired his shares or his debt with the knowledge that the company had been struck off the register. It seems to me it would be impossible for such a person to say that he was aggrieved. He would, in fact, be an officious interloper who, with knowledge of the fact that the company has been struck off, chooses to buy his shares or acquire the debt in the hope that he can get something out of it. Such a person, in my judgment, could not genuinely be said to be aggrieved by the company having been struck off the register.

However, I am told that the allegation in the petition that the petitioners became aware in the beginning of 1959 that the company had been struck off is erroneous, and that, in fact, they did not become aware that the company had been struck off until after the first petitioner had acquired his shares, and possibly after he and the other petitioner had taken an assignment of the debts. So, it would be necessary for me, if I am wrong on my first ground of decision, to consider whether this is a proper case in which the court should exercise its discretion under section 353 (6) to restore the company to the register. This is a company which, so far as one can judge from the evidence, has never prospered, at any rate since the early years of its existence. It is the subject-matter of bankruptcy proceedings in the country in which all its assets exist; and the evidence before the court that some benefit would or might accrue as the result of the company being put back on the register and being able to try to turn its assets to account is not very forceful. Having regard to the period of five years which has elapsed since the company was struck off the register, the very long period since the year 1940

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when there was last any effective control by directors, the fact that the register of the company has been destroyed and that, as I am told, the shareholders of the company consist in the main of a very large number of small shareholders residing in France, and that the latest records of their identity and their addresses is now over 20 years old, the court ought, in my judgment, to require more cogent evidence that some really substantial benefit would accrue to members and creditors of the company from the restoration of the company's name to the register than I have before me in the present case.

Therefore, even if I were wrong on my first ground, in the present case I should be inclined to regard this as a case in which I ought not to exercise my discretion under section 353 (6) to restore the company's name to the register. Accordingly, I take the view that this petition should be dismissed.

Petition dismissed with costs.

Solicitors: *Coward, Chance & Co.; Solicitor, Board of Trade.*

V. A. M.

C. A.

1961 *Feb.* 6, 7, 9.

Lord Evershed M.R., Upjohn and Pearson L.JJ.

In re M. (AN INFANT).

[1960 M. No. 2772.]

Children and Young Persons—Care of—Child received into care by local authority—Child boarded out under statutory agreement—Refusal of foster-mother to deliver up child to local authority—Child made a ward of court on summons issued by foster-mother—Jurisdiction of Chancery Division to consider welfare of child—Children Act, 1948 (11 & 12 *Geo.* 6, *c.* 43), *ss.* 1, 2, 13—*Law Reform* (*Miscellaneous Provisions*) *Act,* 1949 (12, 13 & 14 *Geo.* 6, *c.* 100), *s.* 9.

Infant—Ward of court—Jurisdiction—Child in care of local authority—Whether jurisdiction over child—Law Reform (*Miscellaneous Provisions*) *Act,* 1949, *s.* 9.

Crown—Prerogative—Statute, application to—Crown as parens patriae—Wardship jurisdiction of Chancery Division—Whether restricted by Children Act, 1948.

On April 13, 1956, a local authority received an illegitimate child into their care under section 1 (1) of the Children Act, 1948,[1] and on the same day arranged for him to be boarded out with Mr. and Mrs. X, in whose care he had been for some two years. They signed an undertaking to return him to the local authority if requested. Mr. X died on April 1, 1957. In October, 1957, the local authority resolved under section 2 of the Act of 1948 that all the rights and powers of the mother be vested in them. In June, 1960, the local authority formed the view that the boarding out of the child with Mrs. X was not in his best interests and asked her to return the child to them. She refused to do so on the ground that she had always cared for him and that it was not in his best interests that he should be removed from her. On August 26, 1960, the local authority issued a summons for an order of habeas corpus originally returnable on October 3, 1960, but adjourned until October 19, 1960, to enable Mrs. X to apply for legal aid and to file evidence in answer. On October 14, 1960, Mrs. X issued a summons under section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949,[2] as a result of which the child became a ward of court. On October 19 the habeas corpus application was adjourned generally.

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[1] Children Act, 1948, s. 1: "(1) "Where it appears to a local autho- "rity with respect to a child in their "area appearing to them to be under "the age of seventeen—(a) that he "has neither parent nor guardian or

A summons was issued by the local authority on October 21, 1960, for an order that the child should cease to be a ward of court. On the hearing of that summons no attack was made on the propriety of anything which the local authority had done. It was suggested that the decision reached by the local authority on what appeared to them to be in the best interests of the child might, on review by the court, be held to be wrong:—

Held, that in the absence of any challenge as to the propriety of what the local authority or its officers had done as distinct from

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"has been and remains abandoned by "his parents or guardian or is lost ". . . it shall be the duty of the "local authority to receive the child "into their care under this section. "(2) Where a local authority have "received a child into their care under "this section, it shall, subject to the "provisions of this Part of this Act, "be their duty to keep the child in "their care so long as the welfare of "the child appears to them to require "it. . . ."

S. 2 (1): "Subject to the provi- "sions of this Part of this Act, a "local authority may resolve with "respect to any child in their care ". . . in whose case it appears to "them— . . . (*b*) that a parent or "guardian of his (hereinafter referred "to as the person on whose account "the resolution was passed) has "abandoned him . . . that . . . all "the rights and powers of the person "on whose account the resolution was "passed, shall vest in the local "authority."

[2] Law Reform (Miscellaneous Provisions) Act, 1949, s. 9: "(1) Subject "to the provisions of this section, "no infant shall be made a ward of "court except by virtue of an order "to that effect made by the court. "(2) Where application is made for "such an order in respect of an "infant, the infant shall become a "ward of court on the making of the "application, but shall cease to be a "ward of court at the expiration of "such period as may be prescribed "by rules of court unless within that "period an order has been made in "accordance with the application. "(3) The court may, either upon an "application in that behalf or with- "out such an application, order that "any infant who is for the time being "a ward of court shall cease to be a "ward of court."

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their wisdom, on the true construction of the Children Act, 1948, the matter of judging what was in the best interests of the child, in the circumstances, had been placed in the exclusive jurisdiction of the local authority and, accordingly, the child should cease to be a ward of court (post, pp. 342, 345).

In re A.B. (An Infant) [1954] 2 Q.B. 385; [1954] 3 W.L.R. 1; [1954] 2 All E.R. 287, D.C. approved.

Per Lord Evershed M.R. The prerogative right of the Queen as parens patriae in relation to infants within the realm is not for all purposes ousted or abrogated as the result of the exercise of the duties and powers by local authorities under the Children Act, 1948; in particular, the power to make an infant a ward of court by invocation of section 9 of the Act of 1949 is unaffected.

But even where a child is made a ward of court by virtue of the Act of 1949, the judge in whom the prerogative power is vested will, acting on familiar principles, not exercise control in relation to duties or discretions clearly vested by statute in the local authority, and may, therefore, and, in a case such as the present normally will, order that the child cease to be a ward of court. In many cases where infants are made wards of court, the directions of the court are sought only on particular matters, such, for example, as the place of education or to control the activities of the infant in relation to marriage or undesirable associations where a united parental control has failed; in such cases, the court makes no order as to the custody, care or maintenance, for that remains in the hands of unimpeachable parents and the court does not interfere in relation to such matters.

There remains the right (and duty) of the judge in whom the prerogative power is vested to control the activities of a local authority in cases where the local authority is shown to be acting in some way in breach or in disregard of its statutory duties (post, p. 345).

Decision of Cross J., ante 81; [1960] 3 W.L.R. 1045; [1961] 1 All E.R. 201 affirmed.

Appeal from Cross J.[3]

An illegitimate child was born on July 10, 1952. In August, 1954, when he was about two years old, his mother brought him to the house of a Mr. and Mrs. X and asked Mrs. X if she knew where she could get lodgings. Mrs. X told the mother that, if she cared to trust her, she would look after the child for her for a few days while she looked for a house where she and her child would be accepted. The mother said that she would do this and left her child with Mrs. X, who had a number of young children of her own. The mother never reclaimed her child from Mrs. X but visited him from time to time. Mrs. X last saw the mother in March, 1955, in the maternity ward of a hospital where she had had another child, and she had heard nothing of her since April, 1955, when she had a letter from her. In April, 1956, Mrs. X told the local authority that she was looking after a child who had been abandoned by his mother, and the local authority thereupon put the machinery of the Children Act, 1948, into operation with regard to him.

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[3] Ante 81; [1960] 3 W.L.R. 1045; [1961] 1 All E.R. 201.

On April 13, 1956, the local authority received this child into their care under section 1 (1) of the Act on the ground that he had been abandoned by his mother, and, on the same day, in discharge of their duties under section 13 of the Act they arranged for him to be boarded out with Mr. and Mrs. X, with whom he had in fact been living for the past two years. Mr. and Mrs. X signed an undertaking, in the form provided by the regulations, to return him to the local authority on their request, and the local authority thereupon paid for the child's maintenance. On April 1, 1957, Mr. X died, but the child continued to be boarded out with Mrs. X. In October, 1957, the local authority passed a resolution under section 2 of the Act vesting all the rights and powers of the mother of the child in them. In June, 1960, the local authority formed the view that the boarding out of the child with Mrs. X was no longer in his best interests and asked Mrs. X to return the child to them. She refused to do so, notwithstanding the undertaking which she had signed, on the ground that she had always cared for him well and that it was not in his best interests that he should be removed from her charge.

Cross J. held that the Children Act, 1948, which made express provision for a child passing out of the care of a local authority in certain prescribed circumstances, by necessary implication restricted the prerogative of the Crown; that the jurisdiction of the Chancery Division to inquire into the welfare of a child, which, since the Judicature Acts, was no wider than that of a judge in habeas corpus proceedings, was not enlarged by the alteration in procedure made by the Law Reform (Miscellaneous Provisions) Act, 1949; and that, therefore, since the local authority had acted within the powers conferred on it by the Act of 1948, the court had no right to inquire into the wisdom of their decisions. Accordingly, the child should cease to be a ward of court.

The foster-mother appealed.

John May for the appellant foster-mother. The appellant's submission is that the Children Act, 1948, has not overridden the powers of the Chancery Division with regard to infants. A local authority is put by the Act in the same position as a natural parent and is subject to the same control by the Chancery Division. What the appellant desires is an investigation by the court as to what is in the best interest of this infant and not an arbitrary decision by the local authority to remove the child from her care. There is nothing in the Act of 1948 or in the Boarding-Out of Children Regulations, 1955, made under the power conferred by the Act, which expressly deals with the prerogative rights of the Crown as parens patriae. Cross J. was wrong in holding that the jurisdiction of the Chancery Division had been curtailed by the Act of 1948. The wardship jurisdiction of the Chancery Division is an exercise of the Crown's prerogative powers by delegation. After the passing of the Judicature Act of 1875 that jurisdiction became exercisable not only by the Chancery Division but also by the Queen's Bench Division in habeas corpus proceedings: *Reg.* v. *Gyngall, per* Lord Esher M.R.[4] Since section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, became law, that is no longer the position. Roxburgh J. held in *In re E.* (*An Infant*)[5] that the court cannot exercise the wardship jurisdiction unless an infant has been made a ward of court under section 9.

The appellant's first contention is that the Crown's prerogative rights are not affected by statute unless the intention of the legislature to bind the Crown is clear and unmistakable. That appears from the decisions in *Wheaton* v. *Maple & Co.*[6] and *Attorney-General* v. *De Keyser's Royal Hotel Ltd.*[7] For the Crown's prerogative rights to be cut down by statute, the statute must expressly so state or the Crown must be bound by necessary implication. It is not enough that it would be for the public good that the Crown should be bound: *Province of Bombay* v. *Bombay City Corporation.*[8] It follows that any argument based on convenience or on the suggestion that there might be a conflict in the exercise of the statutory and the prerogative powers is not relevant in considering whether the Crown is bound by necessary implication. The Act of 1948 does not bind the Crown expressly nor does it do so by necessary implication. In *In re A.B.* (*An Infant*)[9] it was held that any discretion of the court had been displaced by the discretion of the local authority. That case is distinguishable, since the child in question was not a ward of court. It is submitted, however, that it was wrongly decided and that it should not be followed. In *In re A.B. (An Infant)*[9] the court applied the decisions in *Point of Ayr Collieries Ltd.* v. *Lloyd-George*[10] and *Carltona* v. *Commissioners of Works.*[11] The court erred in doing so. In both cases wholly new statutory powers had been conferred on a Minister with the exercise of which the court could not interfere. No question of the royal prerogative arose.

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[4] [1893] 2 Q.B. 232, 239; 9 T.L.R. 471, C.A.

[5] [1956] Ch. 23; [1955] 3 W.L.R. 493; [1955] 3 All E.R. 174.

[6] [1893] 3 Ch. 48; 9 T.L.R. 559, C.A.

[7] [1920] A.C. 508; 36 T.L.R. 600, H.L.

[8] [1947] A.C. 58; 62 T.L.R. 642, P.C.

[9] [1954] 2 Q.B. 385; [1954] 3 W.L.R. 1; [1954] 2 All E.R. 287, D.C.

It is not suggested that a local authority is not the proper person to have the care of this child, but it may appear to the court that it is not for the child's benefit that he shall be dealt with as the local authority directs. In *In re A.B. (An Infant)*[12] the court should have gone into the merits and considered how the welfare of the child was best served.

The statement of Cross J.[13] in his judgment that so long as a local authority is acting under its powers under the Act it is not possible for a judge to inquire into the wisdom of their decisions is not accepted as correct. In the Divorce Division such orders are made, although the child is already in the care of a local authority. The Chancery Division is not concerned with who is the child's parent but with what is in the child's best interest. The reasons of Cross J. for holding that the prerogative rights of the Crown had been abrogated were unsound; the fact that their exercise may be inconvenient is not itself a sufficient reason for holding that they had impliedly been taken away.

Finally, what of the other respects with which the court concerns itself in considering the welfare of its wards? The Children Act, 1948, gives to a local authority no control over a child's associates, nor can it prevent a child marrying if the child wishes, and there are no provisions whatever in the Act dealing with such property as the child may have.

F. P. Neill for the local authority. The effect of the Children Act, 1948, and of the regulations made thereunder is that the Crown's rights as parens patriae are by necessary implication displaced. That does not mean that the Crown is not concerned with the welfare of these children. The local authority in exercising its functions does so under the general guidance of the Home Secretary. [Reference was made to sections 39 and 42 (1) of the Act of 1948.] The jurisdiction of the Chancery Division over children in the care of a local authority is excluded for all purposes. The Children and Young Persons (Boarding-Out) Rules, 1946, were by section 60 and paragraph 4 (1) of the Second Schedule of the Act given statutory recognition. Alternatively, it is permissible to look at the Boarding-Out of Children Regulations, 1955, which have been laid before Parliament, to explain any ambiguity in the Act of 1948: *Ex parte Wier*[14]; *Billings* v. *Reed.*[15] The Act and regulations together provide for the child's welfare. What is in the best interest of the child is to be determined under the Act by the local authority. If it does not carry out the statutory duty the remedy is by mandamus. The decisions in *Point of Ayr Collieries Ltd.* v. *Lloyd-George*[16] and *Carltona* v. *Commissioners of Works*[17] are relevant. A decision of the local authority with regard to a child in its care can only be challenged if made mala fide. Here a resolution was passed that it is not in the best interests of this child that he should remain with his foster-mother. It has not been suggested that the resolution was made mala fide.

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[9] [1954] 2 Q.B. 385.

[10] [1943] 2 All E.R. 546, C.A.

[11] Ibid. 560, C.A.

[12] [1954] 2 Q.B. 385.

[13] Ante 81, 87; [1960] 3 W.L.R. 1045, 1050.

The court cannot challenge that decision. To do so might result in a conflict between the order of the court and the statutory duty of the local authority. Conflict might arise: First, under section 1 (2), which provides that a local authority must keep a child in its care. If a child became a ward of court the judge might order that it should cease to be in the local authority's care. It is not necessary that the child should be a ward for its property to be administered by the court. Secondly, where a local authority directed a child to stay with a foster-parent under regulation 4 of the regulations of 1955 and the court made an order requiring the child not to stop with its foster-parent. Thirdly, under section 17 (1) if a local authority had obtained the consent of the Secretary of State to a child emigrating and the Chancery Division made an order forbidding the child to leave the country.

The court is being asked to read Parts I and II of the Act as if the Act contained three provisions which are not there: (1) that a Chancery judge can take a child out of the care of a local authority; (2) that the local authority in exercising the functions conferred on it by Part II must do so subject to the directions of a Chancery judge in a wardship case; (3) that section 17 shall not apply to any infant who is a ward of court. Such provisions cannot be read into the Act. Where Parliament intends that the powers of the local authority shall be modified, it says so in terms, as by section 5 (5) of the Matrimonial Proceedings (Children) Act, 1958, and by section 3 of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960.

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[14] (1871) L.R. 6 Ch. 875.

[15] [1945] K.B. 11; 61 T.L.R. 27; [1944] 2 All E.R. 415, C.A.

[16] [1943] 2 All E.R. 546, C.A.

[17] Ibid. 560, C.A.

It would be an intolerable position if a Chancery judge could by order put a local authority in breach of the statutory duties imposed on it by the Act.

The Law Reform (Miscellaneous Provisions) Act, 1949, by section 9 deals merely with machinery and has not altered the law. *Reg.* v. *Gyngall*[18] still applies and the powers of the Queen's Bench Division have not been altered. In section 9 "infant" must be read as meaning an infant in respect of whom an order can be made. "Infant" there does not include an infant who is in the care of a local authority. Section 9 does not apply where the court has no jurisdiction: *In re E.* (*An Infant*).[19] As to the cases on curtailment of the Crown's prerogative by statute, *Wheaton* v. *Maple & Co.*[20] was a clear case as the Crown was expressly mentioned in sections 1 and 2 of the Prescription Act, 1832, but not in section 3. In *Attorney-General* v. *De Keyser's Royal Hotel Ltd.*[21] Lord Sumner said that the legislature could so deal with a subject-matter as to abate the royal prerogative and that enactments might have that effect provided they directly dealt with the subject-matter, even though they enacted a modus operandi for securing the desired result which was not the same as that of the prerogative. That is this case. *Province of Bombay* v. *Bombay Corporation*[22] was a case of implying a limitation in the prerogative: it was not this case.

It is not a fair criticism of the decision in *In re A.B.* (*An Infant*)[23] to suggest that the earlier authorities were misunderstood. The point raised in this case as to ouster of jurisdiction was squarely raised. If the court had thought that it should consider the welfare of the child it would have refused to make the order. A local authority is not like a natural parent. It is a creature of statute and its actions are not subject to review by the courts like those of an ordinary parent.

It is not correct to say that a child has to be a ward of court before the High Court can administer its property. Moreover, under the County Courts Act, 1959, s. 52 (1) (*e*), the county court has power to administer an infant's property up to the value of

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[18] [1893] 2 Q.B. 232, C.A.

[19] [1956] Ch. 23.

[20] [1893] 3 Ch. 48.

[21] [1920] A.C. 508, 561, H.L.

[22] [1947] A.C. 58, P.C.

[23] [1954] 2 Q.B. 385, D.C.

£500. In the case of marriage, a local authority's consent is required under the Marriage Act, 1949, to the marriage of an infant in its care. If the infant threatens to make an undesirable marriage, an injunction might be obtained in the Queen's Bench Division to restrain it. Any marriage without the local authority's consent would be unlawful. Looking at the matter broadly, the local authority has all necessary power for the proper protection of the children in its care.

John May in reply. Before the passing of the Children Act, 1948, the Crown had a right and duty to care for the persons and property of infants. That was not a question of jurisdiction of the court, but the court was exercising the delegated authority of the Crown. The Act of 1948 either took that power away or it did not. If it did not, all the powers of the local authority are subject to the overriding power of the Crown. There is here no conflict. Just as the decisions of an ordinary parent are subject to the control of the court, so is the statutory guardianship created by the Act of 1948 subject to that control. In the case of statutory powers, such as those of the Probate Division, they are expressly made to override the powers of a local authority under the Act of 1948. There is no need for any such express provision in the case of royal prerogative powers. The onus is on the appellant to show that the local authority is not exercising its powers in the best interests of the child. That onus is a heavy one, but the application should not be dismissed in limine and the appellant not be allowed to attempt to discharge it. The welfare of the child is the primary consideration. The court should not allow the matter to be disposed of without looking into the facts.

LORD EVERSHED M.R. This appeal raises an important question, namely, whether on the facts of the case the terms of the Children Act, 1948, are by necessary implication such as to restrict the ancient prerogative of the Crown as parens patriae as regards infants (now exercisable by way of ward of court procedure in the Chancery Division, the procedure invoked by the present summons), and so to justify the conclusion of Cross J. in declaring that the infant ceased to be a ward.

The facts of the case are as follows: the infant, an illegitimate boy, was born on July 10, 1952. About two years later the boy's mother rang the bell on the appellant's door and asked for information about lodgings for herself and the child. The appellant, who had never seen the mother before, out of the kindness of her heart, offered, while the lodgings were found, herself to look after the child—as she supposed, for a few days. But though there was some further information about the mother, for practical purposes she then disappeared altogether from the scene. In April, 1956, that is some year and a half or more afterwards, the appellant informed the Birmingham Corporation authorities of the presence with her of this child, and on the 13th of that month the child was, by virtue of the powers under the Act of 1948, formally taken into the care of the corporation and formally boarded out with the appellant. The appellant signed, in accordance with the appropriate regulations, an undertaking to return the child on demand to the corporation. The appellant was then married: her husband was living, and there were several children of the marriage. In April, 1957, the appellant's husband died. On October 25, 1957, the corporation took a further step by virtue of section 2 of the Act of 1948, that is to say, they appropriately resolved to assume in regard to the child parental rights; but its boarding out with the appellant continued as before. So we come to June, 1960, in which month the corporation requested, in accordance with the terms of the undertaking, that the appellant should return the child to the corporation. No reasons were given to the foster-mother by the corporation. In August, 1960, the foster-mother not having complied with that demand, application was made by the corporation to Buckley J., sitting as vacation judge, for leave to issue a habeas corpus summons and that leave was given, the hearing of the summons being later adjourned until October 19. Five days before that date, namely, on October 14, the foster-mother took out a summons in the Chancery Division of the High Court entitled in the Law Reform (Miscellaneous Provisions) Act, 1949, asking for an order that the infant be made a ward of court and for directions as to the custody, care and control of the infant.

The relevant terms of section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, are as follows: "(1) Subject to "the provisions of this section no infant shall be made a ward "of court except by virtue of an order to that effect made by "the court." But subsection (2) provides: "Where application "is made for such an order in respect of an infant, the infant "shall become a ward of court on the making of the application, "but shall cease to be a ward of court" at the expiration of the time therein stated, a period inapplicable to the present case. Subsection (3): "The court may, either upon an application in "that behalf or without such an application, order that any "infant who is for the time being a ward of court shall cease to "be a ward of court." I, for my part, reject the argument of Mr. Neill that the section which I have read, being merely procedural, should be limited to apply only to some infants, a class which Mr. Neill did not attempt to define but which he said must be such as to exclude in any event infants in respect of whom the local authority has exercised its powers under the Children Act, 1948. It seems to me that section 9 of the Act of 1949 is quite general and clear in its terms, with the consequence that, upon the issue of a summons as provided by the section, a child becomes a ward and so remains unless and until either: (a) the court sets aside the proceedings altogether—as it would in the case of an infant for whom his parent successfully claims diplomatic privilege: see *In re C. (An Infant)*,[1] or (b) at the expiration of the period indicated in subsection (2), which is not relevant for present purposes, or (c) when the court makes an order, as was done in this case, that the infant ceases to be a ward.

The jurisdiction of the Chancery Division in regard to infants is ancient and has proved itself most salutary. It is a jurisdiction not from its nature and origin to be lightly cut down. On the other hand, there is no doubt that in recent years and in light of modern conditions, including the unhappy fact of there being between 20,000 and 30,000 divorces in every year, the many statutes passed by Parliament for the benefit of children are a recognition of the obligation of the State to take positive measures, and in many cases precisely formulated measures, for the care and upbringing of young children whose circumstances today may be unhappy but who will be the citizens of tomorrow. To a number of such statutes we have been referred, but, having already alluded to the Act of 1949, I shall now confine myself to the Act of 1948, with which we are particularly concerned.

The main part of Mr. May's argument was simple in its nature: it was that the ancient prerogative will not be held by the courts to be ousted or restricted by any statute, unless the statute in question does so expressly or by clear implication of its terms. That general proposition I accept, for it is well established (see, for example, the language of Lindley L.J. in *Wheaton* v. *Maple & Co.*[2]). On the other hand, the necessary clear inference may be drawn when a statute deals with a matter subject to the exercise of the royal prerogative, and provides in precise terms a new means of securing the same result. In that connection I refer to the passage in the speech of Lord Sumner to which our attention was directed in argument. It was the speech in the case of *Attorney-General* v. *De Keyser's Royal Hotel Ltd.*[3] "The "appellant," said Lord Sumner, "further contended that all "that was done could be done, and was done, independently of "any statute, by virtue of the Royal Prerogative alone. I do not "think that the precise extent of the prerogative need now be "dealt with. The Legislature, by appropriate enactment, can "deal with such a subject-matter as that now in question in "such a way as to abate such portions of the prerogative as apply "to it. It seems also to be obvious that enactments may have "this effect, provided they directly deal with the subject-matter, "even though they enact a modus operandi for securing the "desired result, which is not the same as that of the prerogative. "If a statute merely recorded existing inherent powers, nothing "would be gained by the enactment, for nothing would be added "to the existing law. There is no object in dealing by statute "with the same subject-matter as is already dealt with by the "prerogative, unless it be either to limit or at least to vary its "exercise, or to provide an additional mode of attaining the same "object."

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[1] [1959] Ch. 363; [1958] 3 W.L.R. 309; [1958] 2 All E.R. 656.

[2] [1893] 3 Ch. 48, 64; 9 T.L.R. 559, C.A.

What, then, is the effect of the relevant language of the Children Act, 1948? In all the circumstances of the present case and its importance, I shall be excused for making some substantial citations from it. Section 1 (1), being the first section of Part I of the Act with the cross-heading: "Duty of local "authorities to assume care of children," provides: "Where it "appears to a local authority with respect to a child in their "area . . . (*a*) that he has neither parent nor guardian or has "been and remains abandoned by his parents or guardian . . . "and (*c*) . . . that the intervention of the local authority under this "section is necessary in the interests of the welfare of the child, "it shall be the duty of the local authority to receive the child "into their care under this section." Subsection (2): "Where "a local authority have received a child into their care under "this section, it shall . . . be their duty to keep the child in their "care so long as the welfare of the child appears to them to "require it," etc. Section 2 (1) is, so far as relevant, thus: "Subject to the provisions of this Part of this Act, a local

[3] [1920] A.C. 508, 561; 36 T.L.R. 600, H.L.

"authority may resolve with respect to any child in their care "under the foregoing section in whose case it appears to them— "(*b*) that a parent or guardian of his (hereinafter referred to as "the person on whose account the resolution was passed) has "abandoned him . . . that all the rights and powers which . . . "the person on whose account the resolution was passed, "shall vest in the local authority." Section 3 (2) provides that while a resolution passed by virtue of paragraph (*b*) of subsection (1) of section 2 of the Act is in force with respect to a child, all rights and powers which the parents would have in respect of the child shall be vested in the local authority in accordance with the resolution.

I will pass over the remainder of Part I and come to the twelve sections of Part II, beginning with section 11, the cross-heading for that Part of the Act being: "Treatment of children in care "of local authorities." Section 12 (1) provides: "Where a child "is in the care of a local authority, it shall be the duty of that "authority to exercise their powers with respect to him so as to "further his best interests." Section 13 (1): "Subject to "the provisions of this section, a local authority shall discharge "their duty to provide accommodation and maintenance for a "child in their care—(*a*) by boarding him out on such terms as "to payment by the authority and otherwise as the authority "may, subject to the provisions of this Act and regulations "thereunder, determine." Section 14 (1) states that: "The "Secretary of State," that is the Home Secretary, "may by "regulations make provision for the welfare of children boarded "out by local authorities under paragraph (*a*) of subsection (1) "of the last foregoing section," being the subsection I have just read. I pass to section 39 in order to note that by that section the local authority is bound to establish a children's committee for the purposes of exercising their functions under certain enactments, including the Act with which we are now concerned. Section 42 (1) provides that local authorities are to exercise their functions under the enactments to which I have just alluded under the general guidance of the Secretary of State, and finally, section 60 (1) states that the transitional provisions set out in the Second Schedule shall have effect for the purposes of the Act. The Second Schedule by paragraph 4 provides that regulations in force immediately before the commencement of the Act are to have effect and to continue in force as there stated. I have made those last references because, although it may not generally be competent to expand the language of an Act by reference to regulations purporting to be made under it, it is to be noted that in this case the then existing regulations, which are the Children and Young Persons (Boarding-Out) Rules, 1946, are, by section 60 and the Schedule, treated as re-enacted by the terms of the Act of 1948. Finally, I observe that the rules of 1946, which were in force and which are referred to in the Schedule, include in rule 8 (1) this: "A foster-parent shall, on receiving a foster-child "to be boarded out with him, be required by the local authority "to sign in duplicate an agreement in the form set out in the "schedule to these Rules"; and if you look at the schedule you find an agreement with an undertaking to return the child, which is in accordance with what was done in this case. The rules of 1946 were replaced by the Boarding-Out of Children Regulations, 1955, but regulation 20 (1) of the regulations of 1955 is a re-enactment or restatement of rule 8 in the rules of 1946.

What, then, is the effect of this statute to which I have made such references as occur to me to be necessary? I think the effect may be stated in two propositions. First, the enactment is such that, in a case like the present, there is in the Act a clear and comprehensive scheme laid down (what Lord Sumner called a modus operandi) involving positive duties imposed by Parliament on the local authority and a precise formulation of the way in which the consequent powers are to be exercised, and, secondly, that as regards these duties and powers the discretion is conferred upon the authority by the words (which have occurred in the citations I have made), "appears to them." The meaning of that phrase was expounded by Lord Goddard C.J. in *In re A.B. (An Infant)*[4] as meaning "appears to the satisfaction "of the local authority," and that is a formula which, as the Lord Chief Justice pointed out, must be taken to confer an absolute discretion upon the person or authority concerned provided it is exercised bona fide, the Lord Chief Justice in that respect following the decisions of this court in the case of *Point of Ayr Collieries Ltd.* v. *Lloyd-George*[5] and the later case of *Carltona* v. *Commissioners of Works.*[6] Mr. May has said that the relevant committee of this or any local authority is, after all, as he put it, only a conglomeration of persons who may perhaps act by a majority. It may be added also that since human beings are fallible, there may be cases in which a local authority, acting by its committee, may be moved by improper motives, for example, of personal hostility to some person concerned, so that the resolutions or decisions they arrived at can be impeached as not being bona fide exercises of their power. It may also be that a particular visitor might act from some similar motives not properly to be justified. But in the present case no such suggestions have been made and there is no attack whatever on the propriety of anything that the local authority has done or of the motives behind those actions. In the result, all that has been suggested and can be suggested, is that the decisions reached by the local authority or their officers on what appeared to them to be the best interests of the child are, or could, or might be held, on review by the court, to be wrong.

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[4] [1954] 2 Q.B. 385; [1954] 3 W.L.R. 1; [1954] 2 All E.R. 287, D.C.

[5] [1943] 2 All E.R. 546, C.A.

[6] Ibid. 560, C.A.

On those premises, that is to say in the absence of any challenge as to the propriety of what the local authority or its officers have done, as distinct from their wisdom, I feel compelled by the clear indication of the language to which I have alluded in the statute, to conclude that this matter of judging the present best interests of the child in the circumstances of this case has been placed by Parliament in the exclusive jurisdiction of the local authority. Mr. May conceded that, on the premises as I have stated them, the onus would be heavy upon him to persuade the Chancery courts to override or disregard the conclusions of the local authority. But that argument and that concession appear to me to involve Mr. May in something of a dilemma. For the purposes of deciding the immediate questions which now have been raised, either the prerogative jurisdiction survives and exists, or it does not; and if it does survive and exist, then the decision as to what now is in the best interests of the child must rest not with the local authority but with the court. There seems to me to be no escape from that result. I think it also necessary to observe here the position of the foster-parent. The fact that she originally was kind enough to undertake to look after this child voluntarily is, in the present circumstances, in my view no longer relevant. And I am not, of course, to be taken as suggesting anything whatever adverse to her conduct in regard to the child. But her position is in truth equivalent to that of a nurse to whom the child has been temporarily committed by the local authority acting in loco parentis and upon the terms of the undertaking given in accordance with the statutory regulations—a state of affairs, as I think, within the express contemplation and precise formulation of the provisions of the statute.

Let me repeat that I wish in this case to adhere strictly to the facts before us. This is not a case in which application to make the child a ward of court has been made by some person altogether outside the scope of the scheme of the Act or in regard to something outside its contemplation, for example, the question of the marriage of the infant or having to do with its property. I must not be taken, therefore, to be laying down any general proposition intended to apply to other or imagined sets of circumstances which may or may not be held to be within the scope and intendment of the Act of 1948. These cases will be dealt with when the need so to deal with them arises. For it is notorious that, as was stated by Felix Frankfurter J., a distinguished American judge, in some Reflections on the Reading of Statutes (Sixth Annual Cardozo Lecture, 1947, p. 7), in regard to legislation, circumstances do from time to time occur which you might say were "not anticipated by "the most gifted legislative imagination." Nor am I saying that in other cases it might not be proper, as it would be competent, for the court to decide that a child should remain a ward of court even though the court did not then seek to interfere in any way with what the local authority had decided should be done. I confine myself to saying that the state of affairs which is before us is one which is within the strict contemplation and comprehensive provisions of the Act of 1948, as I interpret it, and in the absence of any impeachment of the propriety of what has been done by the local authority or their representatives, the result in this case seems to me to be that the old prerogative jurisdiction must be treated as pro tanto restricted and the proper order to make is that which Cross J. made, namely, to declare that the infant should cease to be a ward of court.

I have referred earlier to the case of *In re A.B. (An Infant)*,[7] and it is proper that I should make some further references to it. That was also a case in which a child had been committed to a foster-mother on the terms of an agreement and undertaking entirely comparable to those in the present case, save that the agreement and undertaking were in accordance with the rules of 1946 instead of the present regulations of 1955. In that case the local authority, who had assumed care of the child, had required delivery of it to the local authority in order that the local authority might send it to another home. The foster-mother declined to deliver the child up, and the proceedings were not by way of ward of court proceedings but by way of habeas corpus proceedings before the Divisional Court of the Queen's Bench Division. It was the decision of the court that, in the circumstances of that case, the statute had comprehensively covered the case and that therefore any discretion in the court had been displaced by the discretion of the local authority. I read two passages from the judgment of Lord Goddard C.J. Having referred earlier to the argument put forward that the court should exercise the prerogative right which in this case is invoked in the Chancery Court and that there was nothing to restrict or oust that jurisdiction, the Lord Chief Justice said[8]: "The Act of 1948 not only enables, but "directs the local authority to act without an order of the court. "In the present case, having acted in accordance with the "statute, the local authority proceeded to take the steps "which Parliament by the combined effect of the Act and "the statutory rules and orders has directed them to take, "that is, to board the child out with foster-parents on the foster-"parents giving an undertaking to return the child if it is "required. I cannot see, under those circumstances, how this "court can step in and say that as between the local authority "and the foster-parents, and contrary to the wishes of the local "authority, we can order the child to remain with the foster-"parents. To do so would be to usurp the duties which are "laid on the local authority by the Act of Parliament, and we "should be substituting our own view as to what was right for "the child as against the view of the local authority. It would "be quite contrary to the whole tenor of Part I and Part II of "the Act of 1948 for this court to assume the duty of reviewing "the discretion of the local authority, and substituting their "own opinion as to what was for the benefit of the child." Then later he said[9]: "I put my judgment in this way: first, "as the child got into the possession of the foster-parents simply "by virtue of the machinery of the Children Act, 1948, and the "rules, one of the statutory provisions being that the child "is to be returned to the local authority if they demand it, "there is no answer to the claim by the local authority when "they say: 'Give us back the child.' Parliament did not con-"sider, nor will this court presume, that the local authority "are not proper persons to have the child back." I cite also one sentence from the judgment of Donovan J.,[10] as he then was, "Thus far, at any rate, Parliament has entrusted the "welfare of the child to the local authority, and to that extent "the prerogative right to secure the welfare of the child is, in "my view, by necessary implication, restricted."

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[7] [1954] 2 Q.B. 385.

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[8] [1954] 2 Q.B. 385, 396.

[9] Ibid. 398.

[10] Ibid. 401.

Mr. May challenged the validity of that decision, but in my judgment it should be supported and was correct. Though the prerogative jurisdiction was referred to, the case was not one, as I have said, in which the child was a ward, but I find nothing in the judgment involving in its result that in all cases of children within the comprehension of the Act of 1948 it necessarily follows that the prerogative jurisdiction exercised by the Chancery Division is for all purposes ousted.

It may perhaps be useful for me to add by way of summary the following:

(1) The prerogative right of the Queen, as parens patriae in relation to infants within the realm, is not for all purposes ousted or abrogated as the result of the exercise of the duties and powers by local authorities under the Children Act, 1948: in particular, the power to make an infant a ward of court by invocation of section 9 of the Act of 1949 is unaffected.

(2) But even where a child is made a ward of court by virtue of the Act of 1949, the judge in whom the prerogative power is vested will, acting on familiar principles, not exercise control in relation to duties or discretions clearly vested by statute in the local authority, and may, therefore, and in a case such as the present normally will, order that the child cease to be a ward of court. This result will occasion no surprise to those familiar with wardship proceedings, for in many cases where infants are made wards of court, the directions of the court are sought only on particular matters, such, for example, as the place of education or to control the activities of the infant in relation to marriage or undesirable associations where united parental control has failed; in such cases the court makes no order as to the custody, care or maintenance, for that remains in the hands of unimpeachable parents and the court does not interfere in relation to such matters.

(3) There remains the right (and duty) of the judge in whom the prerogative power is vested, to control the activities of a local authority in cases where the local authority is shown to be acting in some way in breach or in disregard of its statutory duties.

The present case is, in my judgment, not within the third proposition which I have stated. In this case there is no challenge made as to the propriety of the exercise of the powers by the local authority and, on the facts before us, there can be no object at this stage in maintaining the infant as a ward of court. The power to order that a ward should cease to be a ward has been frequently and usefully exercised since that power was conferred in 1949, and unless there is some real object to be achieved in maintaining the infant as a ward, there is, in my view, no ground for letting him continue so to be. It is much better to order that he cease to be a ward. If some incident should occur in the future which should make it desirable that he should again become a ward, steps to that end can be instantly taken.

For the reasons which I have tried to express, I think the judge rightly made the order appealed from and I would, therefore, dismiss the appeal.

UPJOHN L.J. I agree and do not think I can usefully add anything.

PEARSON L.J. I agree.

Appeal dismissed.
Leave to appeal refused.

Solicitors: *Preston, Lane-Claypon & O'Kelly for Southall & Co., Birmingham; Sharpe, Pritchard & Co. for T. H. Parkinson, Birmingham.*

B. A. B.

1961
Feb. 27.

Buckley J.

In re PARAGON HOLDINGS LTD.

[No. 00385 of 1958.]

Company — Winding up — Contributories — List of — Dispensing with — Surplus assets — Large number of widely held shares — Schedule prepared by liquidator—Whether sufficient evidence of contributories—Whether court should dispense with settlement of list—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 257 (1)—*Companies* (*Winding-Up*) *Rules,* 1949 (*S.I.* 1949, *No.* 330 (*L.* 4)), rr. 80–85.

In the compulsory winding up of a company under the order of the court there remained, after payment of all the debts, a surplus of £857,654 available for distribution among the members. A sum of £813,322 was required to satisfy the rights on a winding up of the holders of the company's 1,311,810 issued cumulative participating preference shares. At the date of the commencement of the winding up transfers of 213,000 of the preference shares had been executed but not registered, and the registered holders of those shares authorised the liquidator to make payment to the transferees. The liquidator prepared a schedule stating the name and address of each preference shareholder, the number of shares of which that person was either the registered holder or transferee, the amounts payable on repayment of capital and on arrears of dividend and finally the total sum which was to be paid to each person. All the issued share capital of the company was fully paid up.

On a summons by the liquidator for an order under section 257 of the Companies Act, 1948,[1] dispensing with the settlement of a list of contributories and authorising him to make a first payment by way of return of assets available for distribution among the members at the rate of 10s. per share together with all arrears of dividend down to the date of payment on the 1,311,810 preference shares by paying to the persons named in the schedule the total amounts against their names:—

Held, that since it was not a case in which any calls or adjustment of the rights of contributories had to be made the court had jurisdiction in its discretion under section 257 (1) of the Act of 1948 to dispense with the settlement of a list of contributories; but that it should not do so in the case of a large company whose shares were widely held in small quantities for in such a case the court could not be satisfied that only the persons whose names were set out in the schedule were the proper recipients unless the proper formalities and the settlement of a list in accordance with rules 80 to 85 of the Companies (Winding-Up) Rules, 1949, which procedure was designed for that purpose, were carried out; and that, therefore, the court could not dispense with the settlement of a list and the liquidation must proceed in accordance with the rules.

In re Phoenix Oil and Transport Co. Ltd. (*No. 2*) [1958] Ch. 565; [1958] 2 W.L.R. 126; [1958] 1 All E.R. 158 applied.

Per curiam. An application for an order under section 265 of the Act of 1948 should be supported by evidence founded on the settling of the list of contributories and proving any facts necessary to bring the position up to date and to justify any variation between the list of contributories and the schedule to the order.

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[1] Companies Act, 1948, s. 257 (1): "As soon as may be after making "a winding-up order, the court shall "settle a list of contributories, with "power to rectify the register of members in all cases where rectification "is required in pursuance of this Act, "and shall cause the assets of the "company to be collected, and applied "in discharge of its liabilities: Provided that, where it appears to the "court that it will not be necessary "to make calls on or adjust the "rights of contributories, the court "may dispense with the settlement of "a list of contributories."

S. 265: "The court shall adjust the "rights of the contributories among "themselves and distribute any surplus among the persons entitled "thereto."

1961

PARAGON HOLDINGS LTD., *In re.*

ADJOURNED SUMMONS.

On May 19, 1958, an order was made for the compulsory winding up of a company, Paragon Holdings Ltd., on the ground of its insolvency. When all the debts had been paid, however, the liquidator had in hand a sum of £857,654 available for distribution among the members of the company. The capital of the company included a class of preference shares of the nominal value of 10s. each which conferred on the holders, while the company was a going concern, the right to a cumulative preferential dividend at the rate of 7½ per cent. and also further participating rights, and, on a winding up, the right to the return of capital in preference to any repayment of capital on the ordinary shares, together with the arrears of the fixed cumulative preferential dividend down to the date of the return of capital. Some 1,311,810 preference shares had been issued and £813,322 4s. was required to repay the capital with arrears of dividend calculated down to March 14, 1961. The dividend would accrue at the rate of £4,099 8s. a month thereafter if payment were not made on March 14, 1961.

At the commencement of the winding up transfers had been executed but not registered of 213,000 preference shares, and the registered holders of those shares by writing authorised the liquidator to make any payments to the transferees. The liquidator prepared a schedule stating the name and address of each preference shareholder to whom it was proposed that payment should be made and the number of shares of which he was the registered holder, or, in the case of a transferee of shares under a transfer which had not been registered, the number of shares of which he claimed to be transferee. It also showed the amounts payable to each person on the shares for repayment of capital, and for the arrears of fixed cumulative preferential dividend and the total amount so payable. All the issued share capital of the company was fully paid up.

The liquidator took out a summons for an order under section 257 of the Companies Act, 1948, dispensing with the settlement of a list of contributories of the company and authorising him to make a first payment by way of return of assets available for distribution among the members at the rate of 10s. per share together with all arrears of dividend calculated due to the date of payment in respect of the 1,311,810 issued cumulative participating preference shares by paying to the persons named in the schedule the total amounts against their names. The Registrar of the Companies Court adjourned the summons into court.

Ralph Instone for the liquidator. Under the proviso to section 257 (1) of the Companies Act, 1948, the court has power to dispense with the settlement of a list of contributories where it will not be necessary to make calls or to adjust the rights of contributories. Here, the issued capital is fully paid up, no adjustment of those rights falls to be made and the schedule prepared by the liquidator states the necessary information, so that it is an appropriate case for the court to exercise its discretion to dispense with the settlement of a list.

In *In re Phoenix Oil and Transport Co. Ltd.*[2] Roxburgh J. held that the mere distribution of surplus assets among the shareholders did not involve the adjustment of contributories' rights. "Adjusting" the rights of contributories means bringing all the contributories into a state of equality among themselves (*Welton* v. *Saffery*[3]), whereas the distribution of assets is a satisfaction and not an adjustment of those rights. Phoenix Oil and Transport Co. Ltd. was a company with a one-class capital and it was the view of the Registrar of the Companies Court that in the case of a company with a two-class capital the distribution of assets necessarily involved the adjustment of contributories' rights, so that *In re Phoenix Oil and Transport Co. Ltd.*[4] was not conclusive; it is, however, clear from the judgment of Roxburgh J. that his decision was independent of the fact that the company had a one-class capital. In *In re Phoenix Oil and Transport Co. Ltd. (No. 2)*[5] Wynn-Parry J. held that under section 265 an order of the court was necessary before the liquidator of a company in a compulsory winding up was entitled to distribute the assets, and an order under that section is now sought.

E. Blanshard Stamp as amicus curiae. Since, under section 265 of the Companies Act, 1948, the court has a duty to distribute surplus assets, it is necessary, following the decision of Wynn-Parry J. in the *Phoenix (No. 2)* case,[5] that there should be a schedule setting out the full names and addresses of the payees. The court must be satisfied that the assets are paid to the persons entitled. The practice is for the liquidator to provide the court with a list of persons who, he says, are entitled, verified by an affidavit, and the procedure laid down by the Companies (Winding-Up) Rules, 1949, should be followed in a case such as the present. Where, as here, a large number of shares were the subject-matter of transfers executed but not registered before the commencement of the winding up, the liquidator must give evidence to the court of those transfers. It is only in the simplest cases that the court can, under the proviso to section 257 (1), dispense with the settlement of a list.

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[2] [1958] Ch. 560; [1957] 3 W.L.R. 633; [1957] 3 All E.R. 218.

[3] [1897] A.C. 299; 13 T.L.R. 340, H.L.

[4] [1958] Ch. 560.

[5] [1958] Ch. 565; [1958] 2 W.L.R. 126; [1958] 1 All E.R. 158.

Instone replied.

BUCKLEY J. stated the facts substantially as set out above and continued: The question is whether, in the circumstances, the court should dispense with the settlement of the list of contributories under the proviso to section 257 (1) of the Companies Act, 1948. That subsection provides: " As soon as may be " after making a winding-up order, the court shall settle a list " of contributories, with power to rectify the register of members " in all cases where rectification is required in pursuance of this " Act, and shall cause the assets of the company to be collected, " and applied in discharge of its liabilities: Provided that, where " it appears to the court that it will not be necessary to make " calls on or adjust the rights of contributories, the court may " dispense with the settlement of a list of contributories."

This is not a case in which there can be any question of making any calls, for all the issued share capital of the company is fully paid. Nor, having regard to the decision of Roxburgh J. in *In re Phoenix Oil and Transport Co. Ltd.*,[1] is it a case in which any adjustment of the rights of the contributories falls to be made. Consequently, the court has jurisdiction, if in its discretion it seems right, to dispense with the settlement of a list. The settlement of a list of contributories is carried out in the manner directed by rules 80 to 85 of the Companies (Winding-Up) Rules, 1949, and it involves the sending of two lots of notices to all the contributories whose names it is proposed to put on the list. No doubt this is an onerous and fairly expensive process to carry out. To determine whether or not it is right in any particular case for the court to dispense with the settlement of the list, I think that it is necessary to consider what subsequent steps have to be taken in a winding up.

In that connection I refer to section 265 of the Act, which provides: " The court shall adjust the rights of the contributories " among themselves and distribute any surplus among the persons " entitled thereto." In *In re Phoenix Oil and Transport Co. Ltd. (No. 2)*,[2] a decision consequent on the order made by Roxburgh J.

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[1] [1958] Ch. 560; [1957] 3 W.L.R. 633; [1957] 3 All E.R. 218.

[2] [1958] Ch. 565; [1958] 2 W.L.R. 126; [1958] 1 All E.R. 158.

in the earlier proceedings, where he dispensed with the settlement of the list of contributories, Wynn-Parry J. held that section 265 required an order of the court before the liquidator of a company in compulsory liquidation was entitled to distribute the assets, whether or not any adjustment had to be made amongst the contributories, and that, although the court might, under rule 120 of the Companies (Winding-Up) Rules, 1949, in a suitable case dispense with certain requirements, the case before him was not one in which the liquidator could properly be authorised to make a return of capital before he had made inquiry as to the persons entitled; the liquidator had to do this at some stage before he was able to ascertain among whom the surplus should be distributed. In a winding up by the court, therefore, the order of the court is required in every case to authorise the liquidator to distribute any surplus assets which fall to be distributed amongst the persons entitled to participate in the surplus assets of the company. Rule 120 of the Companies (Winding-Up) Rules, 1949, provides that: "Every order by which the liquidator in a winding "up by the court is authorised to make a return to contributories "of the company shall, unless the court shall otherwise direct, "contain or have appended thereto a schedule or list (which the "liquidator shall prepare) setting out in a tabular form the full "names and addresses of the persons to whom the return is to "be paid, and the amount of money payable to each person, and "particulars of the transfers of shares (if any) which have been "made or the variations in the list of contributories which have "arisen since the date of the settlement of the list of contributories and such other information as may be requisite to enable "the return to be made. The schedule or list shall be in the "form 70 in the appendix with such variations as circumstances "shall require, and the liquidator shall send a notice of return "to each contributory."

That rule does not lay down any regulations about the evidence which is to support the liquidator's application to the court for an order under section 265. It merely prescribes the form which the order shall take unless the court otherwise directs. I apprehend that the court, when considering an application for an order under section 265, would always require to be furnished with evidence satisfying it that the persons whose names were set out in the schedule referred to in rule 120 were in fact the proper recipients of the money to be distributed. Thus, where a winding-up order has been made, the Act contemplates that normally the list of contributories will be settled in the way indicated in the rules, and that, when the liquidation has been worked out, in due course an application will be made under section 265 for an order setting out in its schedule the details of the persons to whom any funds are to be distributed. The application for that order should be supported by evidence founded on the settling of the list of contributories and proving any facts which might need to be proved to bring that position up to date and to justify any variation between the list of contributories and the schedule to the order.

In the present case the class of shares in respect of which the liquidator is anxious to make distribution is large and there appear to have been a large number of shareholders holding quite a small quantity of shares. Some of those shares have been the subject-matter of transfers which have been executed before the commencement of the winding up but have not been registered. The liquidator said that he had obtained information about these shares, but as the evidence stands at the moment I do not think that the court should be satisfied that only those persons whose names are set out in the exhibited schedule are the right persons to receive any moneys which fall to be distributed.

It is perfectly true, I think, that rules 80 to 85 indicate that the matter which was primarily in the mind of the draftsman was that, where partly paid shares were concerned, there would be persons anxious to ensure that their names should not appear in the list of contributories because they would be anxious to avoid being called upon to contribute to the assets of the company. But it has long been recognised that for the purposes of settling the list of contributories it is not only the partly paid shareholders who are contributories but all the persons who are entitled to participate in the winding up, and of course shareholders who have parted with their shares may, in some circumstances, be put on the list of contributories. I think that the court ought not to be very ready to dispense with the settlement of a list because, even where all the shares are fully paid up, there are quite a number of possible circumstances which might come to the notice of the liquidator in the course of settling the list which had not previously been drawn to his attention. For instance, it is not impossible in a case such as the present, where as many as 213,000 shares were the subject-matter of transfers executed but not registered before the commencement of the winding up, that on investigating the position when notice has been given to all the shareholders in the manner required by the rules the liquidator might find that there were some other shares that had been similarly dealt with of which he had been ignorant. Or he might find, for example, that someone was anxious to say that the register had not been properly kept. That may not be very likely, but it is not impossible that when the list is being settled some information may come to light of which the liquidator was formerly ignorant. If there were a very simple case of a very small number of shareholders where it was possible to establish that the position was perfectly clear without going through the formalities prescribed by the rules relating to the settlement of the list of contributories, that would be the sort of case in which the court could properly dispense with the settlement of the list under section 257 (1), but it should not do so, in my view, in the case of a company with a large number of shares held widely by a large number of shareholders. Indeed, one of the things which the liquidator might discover when settling the list of contributories would be that a number of those shareholders were dead so that he would have to discover who were their personal representatives before he could satisfy the court to whom he should make payment. Those are the kind of matters which the settlement of the list of contributories is calculated among other things to elucidate.

Accordingly, I think that this is not a case in which the court should dispense with the settlement of the list, and the matter should proceed in accordance with the rules.

No order on the summons save that the liquidator's costs be costs in the winding up.

Solicitors: *Allen & Overy; Solicitor, Board of Trade.*

M. G. T.

DIMBULA VALLEY (CEYLON) TEA CO. LTD. *v.* LAURIE AND ANOTHER.

1961
Jan. 19;
Feb. 2.

Buckley J.

[1960 D. No. 1460.]

Company—Winding up—Contributories—Rights to surplus assets—Rights of preference shareholders to participate in "further surplus "assets"—Whether right of participation remains after paying *creditors, costs, arrears of preference dividend and all paid-up capital.*

Company—Capital—Reduction—Capitalisation of reserves resulting from revaluation of capital assets—Article permitting company to capitalise reserves not required for payment of preferential dividend —Whether variation of rights of preference shareholders—Whether legal.

A company was incorporated in 1896 with an authorised capital of £200,000, divided into 10,000 preference shares, 20,000 ordinary shares and 10,000 unclassified shares all of £5 each. Article 5 (a) of the company's articles of association, incorporated by reference into its memorandum of association, gave the preference shareholders the right to receive a cumulative preferential dividend of 6 per cent. per annum on the amount paid up on their shares and article 5 (b) gave them the right in the event of a winding up "to "be paid out of the surplus assets of the company the amount paid "up in respect of such preference shares and all arrears (if any) "of dividend thereon up to the date of the commencement of the "winding up in priority to the other shareholders, and to partici- "pate in any further surplus assets of the company after payment "of the amount paid up in respect of the other shares rateably with "the other shareholders in proportion to the amount paid up" on the preference and other shares. The memorandum provided that the unclassified shares might be issued as preference, ordinary or deferred shares and article 6 of the articles of association that the company might issue the 10,000 unclassified shares or any new shares created on an increase of capital as preference shares to rank pari passu with the original 10,000 preference shares, but so that the total number of preference shares issued should not exceed one-third of the issued share capital. Article 54 provided that each member should have one vote for every 10 shares held; article 85 provided that after setting aside such sum as a reserve as the directors decided, the profits should be divisible among the members in proportion to the amount paid up on their shares and article 90 that the directors might set aside such profits as they thought fit as a reserve, and subject to article 5, might invest the reserve, divide it into funds and employ it in the business without keeping it separate from the other assets.

In 1910, pursuant to a new article, the company subdivided the 22,933 existing ordinary £5 shares into 114,665 ordinary £1 shares and in 1911 substituted for article 54 a new article giving the ordinary shareholders one vote for every five ordinary shares held and the preference shareholders one vote for each preference share held. The original articles of association contained no capitalisation clause but in 1920 the company adopted a new article authorising capitalisation of undivided profits, increased the share capital by the creation of 50,000 ordinary £1 shares and capitalised a sum of £42,044 in the form of ordinary £1 shares distributed among the ordinary shareholders credited as fully paid, which then stood to the credit of the general reserve of the company and represented accumulated revenue. In 1946 the company adopted a new

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set of articles, article 140 of which provided that the company might resolve that any sum not required for the payment of the preferential dividend and (a) for the time being standing to the credit of any reserve account including premiums received on the issue of shares, or any sum arising from any operation creating an excess of assets on capital account, or (b) being undivided net profits in the hands of the company be capitalised and such sum to be "appropriated as capital to and amongst the shareholders who would "have been entitled thereto if the same had been distributed by way "of dividend. . . ."

The company took out a summons to determine, inter alia, the following questions: (1) whether the "further surplus assets" in which under article 5 (b) the preference shares participated in a winding up rateably with the other shareholders meant the assets of the company available after payment of the debts and liabilities and the return to the members of the amounts paid up or credited as paid up on all shares and the payment to the preference shareholders of any arrear of their dividend up to the date of winding up; and (2) whether the company had power pursuant to article 140 to allot to the ordinary shareholders credited as fully paid-up shares or securities by way of capitalisation assets resulting from the revaluation of the capital assets. It was conceded that the company had power to capitalise credit balance on profit and loss account and other revenue reserves, reserves resulting from the realisation of capital profits and share premium account:—

Held, (1) that on the true construction of the memorandum and articles of association, the preference shareholders would be entitled to participate on winding up rateably with the other shareholders in all the assets of the company which remained after paying creditors, costs and arrears of the preference dividend and after repaying all paid-up capital: the rights of the ordinary shareholders to the exclusive enjoyment of accumulated profits not required to pay the preference dividend depended on appropriate resolutions being passed before liquidation began, and in default of such resolutions, such accumulated profits would form part of the fund of assets distributable under article 5 (b) (post, p. 369).

In re Bridgewater Navigation Co. [1891] 2 Ch. 317; 7 T.L.R. 360, C.A. and *Scottish Insurance Corporation Ltd.* v. *Wilsons & Clyde Coal Co. Ltd.* [1949] A.C. 462; 65 T.L.R. 354; [1949] 1 All E.R. 1068, H.L. applied.

(2) That, on its true construction, article 140 authorised the capitalisation of a reserve resulting from the revaluation of capital assets, for such capitalisation was in essence a declaration of a dividend combined with the application of that dividend on behalf of the shareholders entitled to participate in it in paying up the shares to be allotted and issued to them in satisfaction of their rights of participation, and that, as the reserves were distributable among the ordinary shareholders, they might also be legally capitalised without encroaching upon the rights of the preference shareholders (post, pp. 372 to 374).

Hill v. *Permanent Trustee Co. of New South Wales Ltd.* [1930] A.C. 720, P.C.; *Inland Revenue Commissioners* v. *Thornton, Kelley & Co. Ltd.* [1957] 1 W.L.R. 482; [1957] 1 All E.R. 650 applied.

Westburn Sugar Refineries Ltd. v. *Inland Revenue Commissioners* [1960] T.R. 105 not followed.

ADJOURNED SUMMONS.

The following statement of facts is taken from the judgment of Buckley J.:

The plaintiff, the Dimbula Valley (Ceylon) Tea Co. Ltd., was incorporated in 1896 under the Companies Acts, 1862 to 1890, with an original authorised capital of £200,000, divided into 10,000 preference shares, 20,000 ordinary shares and 10,000 unclassified shares, all of £5 each. The memorandum of association provided that the preference shares should carry such rights as were defined "in the articles of association registered here- "with." Article 5 of those articles was in the following terms: "The 10,000 preference shares in the original capital shall confer "on the holders the following rights: (a) The right to receive "out of the profits of the company a cumulative preferential "dividend at the rate of 6 per cent. per annum on the amount "for the time being paid up thereon, such dividend to commence "as from March 31, 1896. (b) The right in the event of the "company being wound up to be paid out of the surplus assets "of the company the amount paid up in respect of such prefer- "ence shares and all arrears (if any) of dividend thereon up to "the date of the commencement of the winding up in priority "to the other shareholders, and to participate in any further "surplus assets of the company after payment of the amount "paid up in respect of the other shares rateably with the other "shareholders in proportion to the amount paid up on the said "preference shares and the other shares respectively."

The memorandum provided that the unclassified shares might be issued as ordinary, preference or deferred shares, or partly in one such manner and partly in another, and the articles authorised the issue of any of these shares or any new shares created on an increase of capital as preference shares ranking pari passu with the original preference shares, but so that the number of preference shares at any time issued should not exceed one-third of the issued share capital of the company.

Voting was regulated by article 54 as follows: "Every "member shall have one vote for every ten shares held by him. "A member shall not be entitled to vote in respect of a less "number of shares than ten, or an excess of shares less than ten "over ten, or any multiple of ten."

Under the heading "Dividends and reserve" the following articles were included: "85. Subject to the rights of members "entitled to shares issued upon special conditions, the profits of "the company, after setting aside such sum to a reserve as the "directors may decide, shall be divisible among the members in "proportion to the amount paid up on the shares held by them "respectively. Provided, nevertheless, that where capital is paid "up in advance of calls, upon the footing that the same shall "carry interest, such capital shall not, whilst carrying interest, "confer a right to participate in profits."

Article 90: "The directors may from time to time set aside "such of the profits of the company as they think proper as a "reserve to meet contingencies, or for equalising dividends or "for repairing, improving, and maintaining any of the property "of the company, and for such other purposes as the directors "shall in their absolute discretion think conducive to the "interests of the company, and may, subject to clause 5 hereof, "invest the several sums so set aside upon such investments as "they may think fit, and from time to time may deal with and "vary such assets and investments and dispose of all or any part "thereof for the benefit of the company, and divide the reserve "into such special funds as they think fit, with full power to "employ the whole or any of the assets constituting the reserve "in the business of the company, and that without being under "any obligation to keep the same separate from the other assets."

There was no article similar to article 114 of Table A of the Companies Act, 1948, in terms authorising the declaration of dividends or providing that no dividend should exceed the amount recommended by the directors, but the declaration of dividends was included amongst the business to be transacted at ordinary general meetings of the company, and there were references to dividends "declared" on shares in articles dealing with the transfer and transmission of shares. There was an article authorising the payment of interim dividends by the directors. The original articles of association contained no capitalisation clause. They contained a common form article authorising increases of capital but no provision for the subdivision of shares. They contained a variation of rights clause but no use was made of this in respect of any of the matters in question.

In May, 1910, the company by special resolution adopted an article authorising the subdivision of shares, and thereupon subdivided the ordinary shares of £5 each, which were then 22,933 in number, into 114,665 ordinary shares of £1 each, and further resolved that any further shares to be thereafter issued as ordinary shares should be divided into and issued as £1 shares. The result of this was to multiply the votes of the ordinary shareholders greatly. In 1911, however, this position was rectified or altered by another special resolution substituting for article 54 a new article which gave ordinary shareholders one vote for every five ordinary shares held, and to preference shareholders one vote for every preference share held. In 1920 the company by special resolution adopted a new article authorising capitalisation of undivided profits.

On April 14, 1920, the company increased its share capital to £250,000 by the creation of 50,000 ordinary shares of £1 each. On the same day the company capitalised a sum of £42,044 in the form of ordinary shares distributed amongst the ordinary shareholders credited as fully paid. The amount so capitalised then stood to the credit of the general reserve of the company and represented accumulated revenue.

In 1946 the company adopted in place of the original articles of association a new set of articles of association, which included a capitalisation article which read: " 140. The company in general " meeting may at any time and from time to time on the recom- " mendation of the board pass a resolution that any sum not " required for the payment or provision of any fixed preferential " dividend and (A) for the time being standing to the credit of " any reserve fund or reserve account of the company, including " premiums received on the issue of any shares or debentures of " the company, or any sum arising from any operation creating " an excess of assets on capital account, or (B) being undivided " net profits in the hands of the company, be capitalised, and " that such sum be appropriated as capital to and amongst the " shareholders who would have been entitled thereto if the same " had been distributed by way of dividend in the shares and " proportions in which they would have been so entitled, and in " such manner as the resolution may direct . . . " The article then provided in the usual way for the sum so appropriated being applied in paying up shares or debentures to be issued to the shareholders in accordance with their rights.

The company took out a summons for the determination of the following questions: (1) Whether on the true construction of the memorandum and articles and in the events which had happened the allotment in 1920 of the 42,044 ordinary shares was in accordance with the rights of the members; (2) if not, whether it must by lapse of time be regarded as valid; (3) whether the further surplus assets in which the preference shares participated in a winding up rateably with the other shareholders meant (a) the assets of the company available after payment of the debts and liabilities of the company, and the return to the members of the amounts paid up or credited as paid up on all shares, and the payment to the preference shareholders of any arrear of their dividend up to the date of the winding up, or (b) some other assets; (4) whether the company had power pursuant to article 140 of the present articles or otherwise to allot to the ordinary shareholders credited as fully paid-up shares or securities by way of capitalisation of (i) credit balance on profit and loss account and other revenue reserves, (ii) reserves resulting from the realisation of capital profits, (iii) reserves resulting from the revaluation of capital assets, or (iv) share premium account, and (5) whether on a poll (a) every member holding ordinary shares had one vote for every five ordinary shares held by him, and every member holding preference shares had one vote for every preference share held by him, or (b) the members were entitled to some other voting rights.

J. G. Monroe for the company.

P. J. Sykes for the first defendant, a representative preference shareholder. On no ground can it be argued on questions 1 and 2 that the allotment in 1920 of the 42,044 ordinary shares was not in accordance with the rights of the members, and in any case it could not be challenged 40 years later.

The answer to question 3 should be in the terms of (a). It will be argued on behalf of the ordinary shareholders that before "surplus assets" can be ascertained an amount representing profits which are appropriated to the ordinary shareholders must first be deducted from the assets remaining after the payment of the company's liabilities and the costs of the liquidation. The determination of shareholders' rights is a matter of the construction of the bargain between the company and its shareholders as expressed in the memorandum and articles of association, and original article 5 (a) contains a complete statement of their rights to participate in profits until a winding up occurs. It

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is clear on the true construction of original article 5 (b) that the contention of the ordinary shareholders is wrong; the right of the preference shareholders cannot be the right to be paid after the deduction of the profits payable to the ordinary shareholders because of the reference in article 5 (b) to payment out of the surplus assets of arrears on preference dividend; ordinary profits only exist where there are no arrears of preference dividend. Therefore, "surplus assets" must mean that which remains after all the claims of the creditors of the company and the costs of the winding up have been paid: see *per* Stirling L.J. in *In re Crichton's Oil Co.*[1] Moreover, if under original article 85 the ordinary shareholders were to take all the profits over and above the 6 per cent. preference dividend, there would be no further surplus assets" left after paying creditors, costs, arrears of preference dividend, repayment of paid-up capital and distribution to the ordinary shareholders of the undistributed profits to which they would have become entitled. *In re Bridgewater Navigation Co.*[2] is distinguishable, for there it was expressly provided by article 85 that the net profits were to "belong to and "be divided among the shareholders." [Reference was made to *In re Crichton's Oil Co.*,[3] *In re Odessa Waterworks Co. Ltd.*,[4] *Bishop* v. *Smyrna and Cassaba Railway Co.*[5] and Buckley on the Companies Acts, 13th ed. (1957), p. 548.] *Scottish Insurance Corporation Ltd.* v. *Wilsons & Clyde Coal Co. Ltd.*[6] is also distinguishable, for there was there an express provision in articles 159 and 160 as to what was to happen in the event of liquidation.[7]

On question 4, if new article 140 purported to vary the preferential shareholders' rights, it was to that extent not binding on them, for those rights could under the new articles only be altered by a scheme of arrangement sanctioned by the court. It is conceded that article 140 authorised capitalisation of credit balance on profit and loss account and other revenue reserves; reserves resulting from the realisation of capital profits and share premium account; capitalisation is not, however, authorised of a reserve fund resulting from the revaluation of capital assets. Such a fund could not have been legitimately distributed by way of dividend (*Westburn Sugar Refineries Ltd.* v. *Inland Revenue Commissioners* [8]), and therefore it cannot legitimately be capitalised. The decision of the Court of Session is not binding on this court but all four members of that court stated categorically that unrealised capital assets cannot be distributed by way of dividend.

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[1] [1902] 2 Ch. 86, 96; 18 T.L.R. 556, C.A.

[2] [1891] 2 Ch. 317; 7 T.L.R. 360, C.A.

[3] [1902] 2 Ch. 86.

[4] [1901] 2 Ch. 190n.

[5] [1895] 2 Ch. 265; 11 T.L.R. 393.

[6] [1949] A.C. 462; 65 T.L.R. 354; [1949] 1 All E.R. 1068, H.L.

[7] [1949] A.C. 462, 479–480, 488.

The answer to question 5 should be in the terms of (a).

Thomas D. D. Divine for the second defendant, a representative ordinary shareholder. This case is in line with *In re Bridgewater Navigation Co.*,[9] as original article 85 provided that the profits were to be divisible in a certain way, and therefore undrawn profits not required for the payment of the preference dividend become appropriated to and belong to the ordinary shareholders and should be excluded from the assets in which the preference shareholders are entitled to participate in a winding up: see the *Wilsons & Clyde* case.[10] The reference in article 5 (b) to arrears of preference dividend was necessary to cover the possibility that there might be arrears of preference dividend at the commencement of the winding up but no profits to meet them. The surplus assets in which the preference shareholders may participate after creditors, costs and arrears of preference dividend have been paid and paid-up capital has been repaid will not include any undistributed profits. " Further surplus assets " refers to matters such as an appreciation of capital assets realised in a winding up, or profits obtained by a liquidator carrying on the company's business for the purposes of the winding up. " Divisible " in original article 85 is peremptory, meaning " shall " be divided," not " shall be capable of being divided ": see the *Wilsons & Clyde* case.[11] Similarly, here, there was nothing to prevent the ordinary shareholders before liquidation from taking for themselves all the undistributed profits not required to satisfy the preference dividend. *In re Crichton's Oil Co.*[12] is distinguishable, for there no larger dividend was to be declared than was recommended by the directors. The profits to which the ordinary shareholders are entitled clearly include realised capital profits in so far as they are not required to meet any losses or depreciation of other assets. Until the *Westburn* case [13] the view was generally held that an accretion in value to assets not realised by a sale could lawfully be distributed by way of dividend though such a distribution might often be unwise. Such an accretion is a profit capable of capitalisation: *Inland Revenue Commissioners* v. *Thornton, Kelley & Co. Ltd.*[14] Subject to the *Westburn* case,[15] which, it is submitted, was wrongly decided and should not be followed, it is clear that as a matter of law a clear capital accretion to assets is capable of distribution by way of capital dividend: see Buckley on the Companies Acts, at p. 902. It is admitted that a revaluation is a matter of opinion, but this is not a fundamental objection. It must, of course, be made bona fide and be of a permanent character.

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[8] [1960] T.R. 105.
[9] [1891] 2 Ch. 317.
[10] [1949] A.C. 462.
[11] [1949] A.C. 462.
[12] [1902] 2 Ch. 86.
[13] [1960] T.R. 105.

It is agreed that question 5 should be answered in terms of (a).

Sykes replied.

Cur. adv. vult.

Feb. 2. BUCKLEY J. read the following judgment, in which he stated the facts and continued: Questions 3 and 4 are hypothetical questions, in this sense, that there is, so far as I know, no present intention of the company being wound up or capitalising any of its undistributed profits, but they are questions which affect the valuing of the company's shares to some extent and which would have to be clarified before any reorganisation of the company's capital structure was undertaken, and I think that it is desirable I should answer them.

Mr. Sykes, who appears for a representative preference shareholder, concedes that, at any rate after so long an interval of time, he could not successfully contend that the capitalisation which was effected in 1920 ought not to be regarded as regular and valid. Indeed, he could suggest no ground on which that capitalisation could be said to have been irregular, and I shall accordingly declare that it was in accordance with the rights of the members.

As regards the powers of the company to capitalise reserves and undistributed profits in the future, however, he has contended that the company has no power to capitalise any reserve resulting from the revaluation of capital assets, although he concedes that it can properly capitalise any credit balance on profit and loss account or other revenue reserve, any reserve resulting from the realisation of capital profits or any amount standing to the credit of a share premium account. As regards a winding up, he contends that the surplus assets in which the preference shareholders are entitled to participate are those assets of the company which remain after all the claims of creditors and the costs of the winding up have been paid.

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[14] [1957] 1 W.L.R. 482; [1957] 1 All E.R. 650.

[15] [1960] T.R. 105.

It will be convenient to consider the rights in a winding up first. The rights attached to the preference shares as set out in the original articles of association were imported into the memorandum of association by reference and consequently remain unaffected by any alterations of the company's articles. So far as participation in profits and in the assets of the company on a winding up is concerned, they are laid down in the original article 5 which I have read. Mr. Sykes concedes that paragraph (a) of that article contains a comprehensive statement of the preferential shareholders' rights to participate in profits until a winding up occurs. As to paragraph (b), he says that "surplus assets" here cannot mean such assets as remain after not only paying creditors and costs but also extracting distributable profits to which any class of shareholders may have become entitled before the winding up began because of the reference to payment out of the surplus assets of arrears of the preference dividend. Moreover, if by virtue of the original article 85 the ordinary shareholders become entitled to all profits of the company as they accrue, not required for payment of the preference dividend, notwithstanding that such profits remain undistributed, Mr. Sykes says that it is hard to see what surplus assets could be left over in a winding up after paying creditors, costs and arrears of preference dividend, repaying paid-up capital and distributing to the ordinary shareholders the undistributed profits to which they would have so become entitled.

On the other hand, Mr. Divine, on behalf of a representative ordinary shareholder, contends that the present case is governed by the decision in *In re Bridgewater Navigation Co.*,[1] that the undistributed profits of the company not required for payment of the preference dividend become appropriated to and belong to the ordinary shareholders and that they ought accordingly to be excluded from the assets in which the preference shareholders are entitled to participate in a winding up. According to Mr. Divine, the surplus assets in which the preference shareholders may participate after creditors, costs and arrears of preference dividend have been paid and paid-up capital has been repaid will not include any such undistributed profits. The reference in paragraph (b) of article 5 to "further surplus assets" relates, according to him, to such matters as appreciation of capital assets realised in the winding up or profits obtained by the liquidator carrying on the company's business for the purposes of the winding up.

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[1] [1891] 2 Ch. 317; 7 T.L.R. 360, C.A.; [1891] 1 Ch. 155.

Before I consider the relevant authorities I will make the following observations. First, it is clear that at any time before liquidation the ordinary shareholders, who control the voting at general meetings, could quite legitimately extract by way of dividends on their ordinary shares the whole of the distributable but undistributed profits except to the extent that they might be required to pay accrued preference dividends. Secondly, assuming that article 140 of the new articles of association adopted in 1946 was validly adopted, it is clear that at any time before liquidation the ordinary shareholders could, under that article, capitalise for their own exclusive benefit the whole of such undistributed profits with the like exception. Even if, therefore, the preference shareholders were entitled to participate pari passu with the ordinary shareholders in any assets of the company remaining after paying creditors, costs and arrears of preference dividend and repaying paid-up capital, their expectations in this respect could not be said to be very great.

Considerations of this kind assisted the majority of the House of Lords in *Scottish Insurance Corporation Ltd.* v. *Wilsons & Clyde Coal Co. Ltd.*[2] to reach the conclusion on the construction of the relevant regulations in that case that the preference shareholders in the respondent company had no such right of participation.

But whether in the present case the preference shareholders have such a right depends upon the bargain between the members constituted by the company's memorandum and articles and depends upon the true interpretation of the original article 5 read in the context of the rest of the original articles of the company. The fact that the ordinary shareholders might be able to defeat the expectations of the preference shareholders to participate in a winding up in undistributed profits is not necessarily inconsistent with the preference shareholders having such a right.

In article 5 (b) the expression " surplus assets " is used twice. Where it first appears it must clearly mean property of the company remaining after the external liabilities of the company have been discharged and provision has been made for the costs of the winding up, but before any capital has been repaid to the preference shareholders or any arrears of preference dividend have been satisfied, and a priori before any capital has been repaid to the ordinary shareholders or any profits have been distributed to them. In other words, " surplus assets " here means all the assets of the company remaining after creditors have been paid and the costs of winding up have been paid or provided for, but before any payment to members as such has been made or provided for. The article confers on the preference shareholders a right to certain preferential payments out of this fund; it then directs repayment thereout of the capital paid up on the other shares of the company, that is to say, the ordinary shares; finally it confers on the preference shareholders a right to " participate " in any further surplus assets of the company " rateably with the other shareholders. In this context I think that " any " further surplus assets " must mean that part of the fund of " surplus assets " referred to earlier in the paragraph which remains after making thereout the specific payments referred to in the paragraph.

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[2] [1949] A.C. 462; 65 T.L.R. 354; [1949] 1 All E.R. 1068, H.L.

In *In re Bridgewater Navigation Co.*[3] the question arose whether undistributed profits of the company were distributable in a winding up amongst the ordinary shareholders of the company only or amongst the preference and ordinary shareholders rateably. The company as originally constituted had only one class of shareholders and its articles provided, inter alia, as follows: Article 85: " Subject to the last preceding article, and " subject to any arrangement which may from time to time have " been entered into relative to the remuneration of any manager " or other officer of the company by way of commission or a per- " centage on the net profits of the company or any part thereof, " the entire net profits of each year shall belong to the holders " of the shares of the company and be divided pro rata upon the " whole paid-up share capital of the company, and the directors " may, with the sanction of the company in general meeting, " declare a dividend to be payable thereout on the shares in " proportion to the amounts paid up thereon."

The preceding article authorised the directors of the company to set aside sums out of profits to reserves. Subsequently the company created a class of preference shares whose right to participate in profits was limited to a preferential dividend at the rate of 5 per cent. per annum.

In *Birch* v. *Cropper*[4] the House of Lords had earlier decided that after adjusting the rights of the shareholders inter se the surplus assets of the company ought to be divided between the shareholders of both classes in proportion to their shares. In *In re Bridgewater Navigation Co.* both North J.[5] and the Court of Appeal[6] took the view that that decision of the House of Lords had not decided the proper destination of the undistributed profits in question before them: presumably this would properly be described as relating to the adjustment of the rights of the shareholders inter se. The decisions of North J. and the Court of Appeal turned mainly upon the terms of article 85 of the company's articles of association, which I have read. Having regard to the creation of the preference shares with a limited right to participate in profits North J. held[7] that that article should be treated as though it read "shall after payment of the dividend "to the preference shareholders belong to and be divided pro "rata among the ordinary shareholders of the company." He consequently held that the ordinary shareholders were exclusively entitled to the net profits of the year current at the date of liquidation, subject to paying an apportioned preference dividend to the preference shareholders, and to a sum reserved but not required for canal improvements, but not to certain other reserves. The Court of Appeal[8] varied the order of North J., holding that the last-mentioned reserves also represented undistributed profits, which had not lost that character as a result of having been reserved for purposes for which in the event they were not required. The significant circumstance in the case was, in my judgment, that article 85 provided that the whole of the company's net profits of each year remaining after payment of the preference dividend should "belong to and be divided among" the ordinary shareholders. The right of the preference shareholders to participate in the company's assets in a winding up necessarily took effect subject to this right of the ordinary shareholders.

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[3] [1891] 2 Ch. 317; [1891] 1 Ch. 155.

[4] (1889) 14 App.Cas. 525; 5 T.L.R. 722, H.L.

By the articles of association which came under consideration in *Scottish Insurance Corporation Ltd.* v. *Wilsons & Clyde Coal Co. Ltd.*[9] the right of the preference shareholders of the respondent company to participate in profits while the company was a going concern was limited to a cumulative preferential dividend at a stated rate, subject to which the residue of the profits was declared by article 128 to be "divisible" amongst the ordinary shareholders. In a winding up the preference shareholders were given a preferential right to repayment of capital paid up on their shares but the articles were silent about what should happen to any assets remaining after that preferential right was satisfied. The majority of the House of Lords held as a matter of construction that the articles dealing with the preferential rights of the preference shareholders in a winding up contained an exhaustive statement of their rights to participate in the company's assets in a winding up. From the fact that their right to participate in profits while the company was a going concern was limited to their preferential dividend and that their right to participate in a winding up was restricted to repayment of the capital paid up on their shares, it would naturally follow that the profits of the company which were not required for payment of the preference dividend belonged at all times to the ordinary shareholders. Lord Maugham, Lord Simonds and Lord Normand, however, all seem to have reached the conclusion that the rights of the preference shareholders in a winding up were restricted to repayment of capital by the road of first holding that the profits so far as not required for payment of the preference dividend became appropriated to the ordinary shareholders and belonged to them while the company was still a going concern. In reaching this conclusion they were largely influenced by the circumstance that the articles gave the ordinary shareholders complete control of these profits until liquidation.

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[5] [1891] 1 Ch. 155.
[6] [1891] 2 Ch. 317.
[7] [1891] 1 Ch. 155, 168.
[8] [1891] 2 Ch. 317.
[9] [1949] A.C. 462.

I think that the decision may be summarised as follows: (1) the article regulating the distribution of profits did not in terms state that profits remaining after paying the preference dividends should belong in any event to the ordinary shareholders; (2) the article dealing with rights in a winding up was silent about whether the preference shareholders should or should not participate in surplus assets available for distribution after repayment of all paid-up capital; (3) it was clear that until liquidation began the ordinary shareholders could, by means of dividends and capitalisation, appropriate to themselves all the undistributed profits not required to pay preference dividends. The majority of the House of Lords considered the last-mentioned circumstance to afford the clue to the proper construction to be adopted as regards (1) and (2)—see *per* Lord Maugham,[10] Lord Simonds[11] and Lord Normand.[12]

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[10] [1949] A.C. 462, 479–480.

[11] Ibid. 488.

[12] Ibid. 494.

As regards (1), the *Wilsons & Clyde* case [13] differed from the *Bridgewater* case [14] but was similar to the present case. As regards (2), the *Bridgewater case* [14] was similar to the *Wilsons & Clyde case* [13] and the present case differs from them both by reason of the terms of article 5 (b). As regards (3), the present case resembles the *Wilsons & Clyde* case.[13]

The significant distinction between the present case and the *Wilsons & Clyde* case [13] is that paragraph (b) of the original article 5 in the present case makes it clear that the preference shareholders are entitled to participate to some extent in a winding up beyond repayment of their paid-up capital and payment of arrears of their preference dividend. The question is to what extent they are so entitled.

The distinction between this case and the *Bridgewater* case [14] is that the original article 85 in the present case said, not that the profits there referred to should " belong " to the ordinary shareholders, but that they should be " divisible " among (in effect) the ordinary shareholders. In such a passage " divisible " might, as a matter of interpretation, mean " that which is to be divided " or " that which is capable of being divided." In the *Wilsons & Clyde* case [15] the former of these alternatives was adopted for reasons which I have already indicated. Mr. Divine says that similar reasons apply here because there was nothing in the original articles to prevent the ordinary shareholders at any time before liquidation from taking for themselves all the undistributed profits not required to satisfy the preference dividend. This is true, but I must also keep in mind the terms of article 5 (b). As I have endeavoured to show, in the *Wilsons & Clyde* case [15] the appropriation to the ordinary shareholders of profits not required to pay preference dividends and the exclusion of the preference shareholders from participation in any surplus assets were complementary provisions. In the present case a parallel position does not exist because of the reference in article 5 (b) to participation by the preference shareholders in surplus assets. The circumstance that the ordinary shareholders have complete dominion over profits while the company is a going concern is not necessarily inconsistent with another class of shareholders having a right to participate in profits which the ordinary shareholders choose to leave undistributed until after the commencement of a winding up.

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[13] [1949] A.C. 462.

[14] [1891] 2 Ch. 317.

[15] [1949] A.C. 462.

Having regard to the analysis which I have made of the language of paragraph (b) of article 5 I feel compelled to the view that in the present case the preference shareholders would be entitled to participate in a winding up rateably with the other shareholders in all the assets of the company which remain after paying creditors, costs and arrears of the preference dividend and after repaying all paid-up capital. I do not think that either the *Bridgewater* case[16] or the *Wilsons & Clyde* case[15] requires or enables me to reach another view. Indeed, I think that part of Lord Simonds' reasoning in the latter case strongly supports my view. He said[17]: "There is another somewhat general considera-"tion which also, I think, deserves attention. If the contrary "view of articles 159 and 160 is the right one and the preference "stockholders are entitled to a share in surplus assets, the "question will still arise what those surplus assets are. For the "profits, though undrawn, belong, subject to the payment of "the preference dividend, to the ordinary stockholders and, in so "far as surplus assets are attributable to undrawn profts, the "preference stockholders have no right to them. This appears "to follow from the decision of the Court of Appeal in *In re* "*Bridgewater Navigation Company*,[18] in which the judgment of "the House of Lords in *Birch* v. *Cropper*[19] is worked out. This "again is not decisive of the construction of particular articles, "but I am unwilling to suppose that the parties intended a "bargain which would involve an investigation of an artificial and "elaborate character into the nature and origin of surplus assets."

In a case like the present, in which it is clear that the preference shareholders are to participate to some extent in surplus assets, an investigation of the kind envisaged by Lord Simonds would be involved if the surplus assets had to be divided into two categories, namely, undistributed profits belonging to the ordinary shareholders, and other surplus assets.

I consequently reach the conclusion that in the present case the right of the ordinary shareholders to the exclusive enjoyment of accumulated profits which are not required to pay the preference dividend depends upon appropriate resolutions being passed before liquidation begins, and that in default of such resolutions such accumulated profits will form part of the fund of assets distributable under article 5 (b).

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[15] [1949] A.C. 462.

[16] [1891] 2 Ch. 317.

[17] [1949] A.C. 462, 488.

[18] [1891] 2 Ch. 317.

[19] 14 App.Cas. 525.

I have reached this conclusion without reference to the company's new articles of association, but I should point out that under article 130 of those articles no dividend can be declared in excess of the recommendation of the directors. The ordinary shareholders consequently no longer enjoy the dominion over profits which they enjoyed under the original articles and upon which Mr. Divine relies.

Accordingly I will declare, in answer to question 3 of the originating summons, that according to the true construction of the memorandum and articles of association of the company the preference shareholders will be entitled in a winding up to participate rateably with the other shareholders of the company in the assets of the company available after payment of the debts and liabilities of the company and the return to the members of the amounts paid up or credited as paid up on all shares in the company and the payment to the preference shareholders of any arrears of their dividend up to the date of the commencement of the winding up, and after providing for costs.

I come now to the question of the effect of the capitalisation article, article 140 in the company's new articles of association. Mr. Sykes' first submission with regard to this was that if this article in any respect varied, or purported to vary, the rights of the preference shareholders, it is to that extent not binding on them. This must be right, because the rights of the preference shareholders are by reference written into the memorandum of association and so are only capable of variation by a scheme of arrangement sanctioned by the court under the Companies Acts, except that possibly the rights so written into the memorandum ought to be taken as capable of being varied in accordance with the modification of rights clause contained in the original articles of association, but this clause, as I have stated, has never been operated. Accordingly the question raised by the originating summons in respect of article 140 involves first the consideration of whether under the terms of that article amounts standing to the credit of all, or some, and if so which, of the accounts referred to in question 4 of the summons can be capitalised, and secondly the consideration of whether the power to capitalise so construed conflicts with any right of the preference shareholders.

Mr. Sykes concedes that capitalisation is authorised by the article under all of the heads mentioned in the question except reserves resulting from the revaluation of capital assets.

He relies, in this connection, upon *Westburn Sugar Refineries Ltd.* v. *Inland Revenue Commissioners*,[20] where a revaluation in 1948 of the company's buildings, plant and machinery disclosed an excess of £155,910 over book values. This excess was carried to capital reserve. In the following year the company capitalised £152,250 of the amount on capital reserve. In 1950 the company, having carried out certain other transactions, reduced its capital by repaying part of its paid-up capital. This reduction was confirmed, the application for confirmation being carried as far as the House of Lords: see *Ex parte Westburn Sugar Refineries Ltd.*[21] In those proceedings the propriety of the 1949 capitalisation was not in issue, but it does not seem to have struck anybody that there might have been anything wrong about it. Later the question whether the capitalisation attracted profits tax as being a capitalisation of a "distributable sum" within section 31 of the Finance Act, 1951, came before the Court of Session. The Lord President (Lord Clyde) (who, incidentally, had been one of the counsel engaged in the proceedings before the House of Lords in 1951), after holding that the capitalisation having been of an increment in the value of fixed assets, the subject-matter could not have been utilised in making a distribution within the meaning of the section, went on to say,[22] as a separate ground for his decision, that it would have been illegal for the company to have distributed the amount in question. After referring to a passage in Palmer's Company Law, 20th ed. (1959), at p. 645, which, for myself, I read as saying that by law an unrealised profit resulting merely from revaluation of fixed assets can be treated as a profit for dividend purposes, but that this is not normally to be regarded as a wise commercial practice, but which the Lord President seems to have interpreted otherwise, he said[23]: "I am of opinion that these observations are sound, and that "particularly in the case of an appreciation, which is neither "realised nor immediately realisable, it would be illegal to "distribute the surplus." Lord Sorn said[24]: "In my view, "capital profits are not distributable until they are realised."

Founding himself on these observations Mr. Sykes contends that a reserve fund resulting from a revaluation of fixed assets could not legitimately be distributed by way of dividend. Consequently, he says, it cannot legitimately be capitalised. It is to be observed that article 140 provides that the capitalised sum is to be "appropriated as capital to and amongst the shareholders "who would have been entitled thereto if the same had been "distributed by way of dividend in the shares and proportions in "which they would have been so entitled." These words are common form in articles of this kind, and I think that it is correct to say that a capitalisation of this sort is in essence the declaration of a dividend combined with the application of that dividend on behalf of the shareholders entitled to participate in it in paying up shares to be allotted and issued to them in satisfaction of their rights of participation: see *Hill* v. *Permanent Trustee Co. of New South Wales Ltd.*[25] As a general rule only that which could be distributed in dividends can be capitalised. Where the rights of various classes of shares to participate in profits differ from their rights of participating in a winding up, any other view or arrangement would lead to anomalous results. The exception to this general rule is that a sum standing to the credit of a share premium account or of a capital redemption reserve fund may not be distributed, except as provided by section 56 (1) or section 58 (1) of the Companies Act, 1948, but may be capitalised under section 56 (2) or section 58 (5). The Court of Appeal has held that, if a share premium account is distributed with the sanction of the court, the distribution must be treated as though it were not a distribution of profit but a repayment of paid-up capital: *In re Duff's Settlements.*[26] A share premium account and a capital redemption reserve fund are, however, statutory creatures and these statutory provisions governing their distribution are of a special and artificial character. This exception to the general rule which I have formulated accordingly does not, in my judgment, in any way discredit the rule.

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[20] [1960] T.R. 105.

[21] [1951] A.C. 625; [1951] 1 T.L.R. 728; [1951] 1 All E.R. 881, H.L.

[22] [1960] T.R. 105, 107.

[23] Ibid.

[24] Ibid. 109.

If, therefore, the Court of Session was right in holding that a reserve fund constituted as a result of a revaluation of unrealised fixed assets could not legally be distributed, it would seem to me to follow that it likewise could not legally be capitalised. It has, I think, long been the generally accepted view of the law in this country (though not established by judicial authority) that, if the surplus on capital account results from a valuation made in good faith by competent valuers, and is not likely to be liable to short-term fluctuations, it may properly be capitalised: see *Inland Revenue Commissioners* v. *Thornton, Kelley & Co. Ltd.*[27]

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[25] [1930] A.C. 720, P.C.

[26] [1951] Ch. 923; [1951] 2 T.L.R. 474; [1951] 2 All E.R. 534, C.A.

[27] [1957] 1 W.L.R. 482; [1957] 1 All E.R. 650.

Indeed, as I have pointed out, this was actually done by Westburn Sugar Refineries Ltd. For myself, I can see no reason why, if the valuation is not open to criticism, this should not be so, or even why, in any case in which the regulations of the company permit the distribution by way of dividend of profit on capital account, a surplus so ascertained should not be distributed in that manner. After all, every profit and loss account of a trading concern which opens and closes with a stock figure necessarily embodies an element of estimate. The difference between ascertaining trading profits by, amongst other things, estimating the value of the stock in hand at the beginning and end of the accounting period, and ascertaining capital profits by comparing an estimated value of the assets with their book value, appears to me to be a difference of degree but not of principle. Moreover, if a company has fluid assets available for payment of a dividend, I can see nothing wrong in its using those assets for payment of a dividend, and at the same time, as a matter of account, treating that dividend as paid out of a capital surplus resulting from an appreciation in value of unrealised fixed assets. The proper balance of the company's balance-sheet would not be disturbed by such a course of action. The company would be left with assets of sufficient value to meet the commitments shown on the liabilities side of its balance-sheet, including paid-up share capital. A company is not required by law to keep any part of its assets in any particular form. I do not say that in many cases such a course of action would be a wise commercial practice, but for myself I see no ground for saying that it is illegal.

The Lord President and Lord Sorn both referred to dicta in various English cases, but with the exception of *Bolton* v. *Natal Land and Colonisation Co.*,[28] the decision in which has no bearing on the question I am considering, these cases all related to realised capital appreciation, not to surpluses founded on estimates of values.

I should naturally wish to pay the greatest respect to the decision of the Court of Session in the *Westburn Sugar* case,[29] notwithstanding that it is not binding on me, but for the reasons indicated above I feel constrained to differ from it.

For these reasons I reach the conclusion that, unless it conflicts with the rights of the preference shareholders, article 140 authorises capitalisation of a reserve resulting from the revaluation of capital assets.

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[28] [1892] 2 Ch. 124; 8 T.L.R. 148.

[29] [1960] T.R. 105.

As, for the same reasons, I have also reached the conclusion that the company could legitimately distribute a capital surplus of this nature by way of dividend, that is to say, exclusively amongst the ordinary shareholders at any time when the preference dividend has been paid in full, a capitalisation exclusively for the benefit of the ordinary shares in similar circumstances could not, in my opinion, encroach upon the rights of the preference shareholders.

Accordingly, I shall declare that the company has power pursuant to article 140 of its present articles of association to capitalise under all the heads set out in question 4 of the originating summons.

There remains only the question relating to voting rights. Neither counsel before me really sought to argue that question 5 of the originating summons ought not to be answered in the sense of paragraph (a). The increase of the ordinary shareholders' voting rights resulting from the subdivision of their shares did not alter the rights attached to the preference shares, although it decreased their effectiveness. The increase of the preference shareholders' voting rights effected in 1911 did not deprive the preference shareholders of any existing right: it conferred additional rights on them. Consequently, in my judgment, it did not vary or abrogate any right conferred on the preference shareholders by the memorandum of association: it reinforced such rights. Similarly, the increase in the ordinary shareholders' voting rights which was effected at the same time did not deprive them of any rights but conferred additional rights. In these circumstances I will make a declaration in the terms of paragraph (a) of question 5.

Declarations accordingly.
No order as to costs.

Solicitors: *Stephenson, Harwood & Tatham.*

M. G. T.

WINDSOR REFRIGERATOR CO. LTD. AND ANOTHER *v.* BRANCH NOMINEES LTD. AND OTHERS.

C. A.

1960
Nov. 22,
23, 24;
Dec. 7.

[1958 W. No. 1431.]

Lord Evershed M.R., Harman and Donovan L.JJ.

Company—Debenture—Receiver—Appointment by debenture holder—Validity—Whether document capable of operating as instrument "by writing" if executed as deed.

Practice — Preliminary point — Questions of mixed fact and law — Whether procedure appropriate.

Writing—Instrument in—Purported deed—Written before intended to take effect—Whether it could operate as an "instrument in writing" —Appointment of receiver.

Deed — Purported deed — Whether an "instrument in writing" — Appointment of receiver.

A debenture issued by a company on April 30, 1946, to secure a bank advance, contained a condition that at any time after the principal moneys thereby secured became payable, the registered holder of the debenture might by writing appoint a receiver. On the same day an agreement was made between the company, the bank, and the debenture holders, which provided that the debenture holders should hold the debenture and the moneys secured thereby on trust for the bank as a continuing security, and subject thereto on trust for the company, and that the debenture holders might at the request of the bank at any time thereafter in case of default in payment of the sum secured on demand, exercise the power to appoint a receiver. Two further debentures were issued accompanied by similar agreements.

On February 24, 1958, the advance department of the bank asked the debenture holders to prepare a formal demand for payment of the total sum due under the debentures and a letter authorising I., the branch manager of the bank, to receive payment: on the same day, or early on the following day, an instrument purporting to appoint G. as receiver was sent with a request that it should be sealed by the debenture holders. On February 25 the instrument was sealed and signed by two of the directors of the debenture holders, but the date was left blank. A formal demand for payment and a letter to the secretary of the company authorising I. to receive payment were also prepared and signed on behalf of the debenture holders. The advance department sent the instrument, the formal demand and the letter to I., instructing him to present the demand and the letter personally at the company's registered office, and that, failing immediate payment, the instrument of appointment should be handed to G., and that he was to settle beforehand with G. the amount of G.'s remuneration. The defendants alleged that on the morning of February 28, I. inserted that date in the instrument of appointment and went with G. to the company's office, where, according to the defence, he handed the demand and the letter to the managing director. After a discussion

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G. entered the office. According to the defence, I. stated that G. was to be appointed receiver and gave him the instrument and G. then gave the director a letter dated February 28 in which he stated that he had been appointed receiver under the debentures. The company and the managing director claimed a declaration that the appointment of G. was invalid.

On the trial of the preliminary points of law whether the steps taken were invalid to effect the appointment of G., upon certain agreed assumptions as to material facts not before the court, the judge decided that the instrument was not effective to operate either as a deed or as an instrument under hand to appoint G. as receiver. The defendants (the bank, the debenture holders and the receiver) appealed:—

Held, (1) that, assuming that the instrument of appointment was ineffective as a deed, it could be effective according to its tenor as an instrument in writing in various events which might have happened—for example, if before the purported appointment was made formal demand for payment had been made by I. acting with authority as agent for the debenture holders and had not been complied with—and that the appointment had been communicated to G. (post, pp. 393, 394, 397, 398).

(2) That an appointment by writing could be made out before it was intended to take effect, and could take effect on a subsequent date (post, pp. 395, 397).

Decision of Cross J., ante 88; [1960] 3 W.L.R. 108; [1960] 2 All E.R. 568 reversed on this ground.

Per curiam. The preliminary so-called "points of law" involved questions of fact and law and ought not to be determined prior to the trial.

APPEAL on preliminary points of law set down for hearing before trial.

The following statement of facts is taken substantially from the judgment of Cross J.: The Windsor Refrigerator Co. Ltd., the first plaintiff, had an account at the Reading branch of the National Provincial Bank Ltd., the second defendants (hereinafter called "the bank"). The defendants, Branch Nominees Ltd., the debenture holders, were a wholly-owned subsidiary of the bank, and securities given to the bank to secure advances were commonly taken in the name of and issued to the debenture holders as trustees for or nominees of the bank. The functions of the debenture holders in that regard were carried out as part of the department of the bank known as "the security department," while control and superintendence of advances made by the bank through its various branches by way of overdrafts or otherwise were exercised by the department of the bank known as "the advance department." The advance department had therefore control and superintendence of the company's account with the bank at its Reading branch.

On April 30, 1946, the plaintiff company issued under the seal of the company a debenture in common form, containing a promise by the company to pay to the debenture holders on demand the sum of £3,000 with interest at 5 per cent. per annum, and a floating charge on all the property of the company to secure the payment of capital and interest. The debenture was issued subject to and with the benefit of the conditions indorsed on it. Condition 12 (1) was in the following terms: "At any time after "the principal moneys hereby secured shall have become payable the registered holder of this debenture may at any time "appoint by writing any person or persons to be a receiver or "receivers of the property charged by this debenture and may "from time to time by writing remove any receiver so appointed "and appoint another in his stead." Sub-paragraphs (2), (3) and (4) of paragraph 12 contained the usual provisions with regard to the powers, duties and remuneration of any receiver so appointed.

On April 30, 1946, the same day as the debenture was issued, an agreement (called a "Buckley agreement") was made between the company, the bank and the debenture holders. Clause 1 of that agreement provided that the debenture holders, therein described as "the trustees," should stand possessed of the debenture and the money secured by it on trust in the first place as a continuing security for payment by the company to the bank on demand of all moneys owing by the company to the bank and, subject to such trust in favour of the bank, on trust for the company. Clause 2 provided that it should be lawful for the debenture holders, at the request of the bank at any time thereafter in case of default in payment of such sum or sums or any part thereof on demand, to exercise all and every or any of the powers vested by the debenture in the holders thereof, including (inter alia) the power to appoint a receiver, and that the debenture holders should execute all such assurances and do all such acts as the bank should require or think proper.

On December 11, 1947, and January 31, 1951, similar debentures for securing sums of £2,000 and £5,000 respectively were issued by the company to the debenture holders, accompanied in each case by similar agreements between the company, the bank and the debenture holders.

On February 24, 1958, the advance department of the bank, by a memorandum in writing, requested the debenture holders to prepare a formal demand for payment of the full amount of £10,000 owing by the company under the three debentures, and a letter authorising Noel David Inkin or Vernon Penrose Hobby, the manager and senior clerk of the Reading branch of the bank, to receive payment of that sum on behalf of the debenture holders.

On the same day, or early on the next day, the advance department sent to the security department an instrument of appointment of Philip Clarkson Greenwood, the third defendant (hereinafter called "the receiver"), as receiver under the debentures, with a request in writing that it should be sealed by the debenture holders. That document was in the following terms: "We, Branch Nominees Limited, being the registered holders of "the debentures referred to in the schedule hereunder written "and under and in accordance with the provisions of the conditions endorsed upon the said debentures and all other powers us "enabling, hereby appoint Mr. Philip Clarkson Greenwood, "A.C.A., to be receiver of the undertaking and all of the property "and assets of Windsor Refrigerator Co. Ltd. comprised in and "charged by the said debentures upon the terms and with and "subject to the powers and provisions contained in the said "debentures, and we declare that the said receiver shall be "entitled to remuneration at the rate already arranged between "us and the said receiver or at such higher rate not exceeding "5 per cent. as shall or may from time to time be agreed by us "with him as witness our common seal this —— day of —— "1958." The schedule contained details of the three debentures.

At about 10 o'clock on the morning of February 25, the common seal of the debenture holders was affixed to that instrument of appointment in the presence of two of the directors of the debenture holders, who signed their names in the space provided for the purpose on the instrument, but the date was left blank. The debenture holders thereupon returned the instrument so sealed to the advance department, together with a formal demand for payment by the company to the debenture holders of £10,000, signed by a director, and a letter to the secretary of the company, also signed by a director, authorising the manager or the senior clerk of the Reading branch to receive payment of the £10,000 on behalf of the debenture holders.

On the same day, the advance department of the bank sent the instrument of appointment and the two letters to the bank manager, together with a letter in the following terms: "In

" reply to your letters of the 19th and 21st instant, the directors " desire you to call up the debt and guarantees and we confirm " our recent telephone conversation to this effect. They have " appointed Mr. Philip Clarkson Greenwood, A.C.A., to act as " receiver and have transferred the account to realisation section, " who will instruct you further in due course. A formal demand " by Branch Nominees Ltd. for payment of the amount due under " the debentures is enclosed, together with a letter from Branch " Nominees Ltd., authorising Mr. Noel David Inkin or Mr. Vernon " Penrose Hobby to receive payment. It is essential that these " should be presented personally by Mr. Inkin or Mr. Hobby at " the company's registered office and he should take with him the " debentures so as to produce them in case of need. Failing " immediate repayment, you may then hand the enclosed deed of " appointment to Mr. Philip C. Greenwood. As you are no doubt " aware, the deed of appointment requires to be stamped 10s., " and realisation section should be advised of the date inserted " by return of post in order that the necessary notice may be " filed with the registrar of joint stock companies within the " prescribed period of seven days. We should like you to discuss " and settle beforehand with Mr. Greenwood the question of his " remuneration as receiver and in this connection we consider " that 5 per cent. on realisations would be a reasonable scale, " but in the event of its being necessary for the receiver to " employ agents for the disposal of the assets and commissions, " fees, etc., have to be paid to such agents, then the amount " payable to the receiver in respect of such realisations should be " 2½ per cent. only. We return the debentures totalling £10,000, " Buckley agreements and certificates of registration, receipt of " which kindly acknowledge."

The following statement of subsequent events prior to the issue of the writ is as alleged by the defendants: On February 26, the bank manager, having received this letter and its enclosures, made an appointment by telephone with Harry Fletcher Wood, the second plaintiff, the managing director of the company, to meet him at 11 o'clock on February 28, to discuss the company's account, which was then overdrawn to the extent of £8,032 14s. 9d. At about 10.20 a.m. on the morning of February 28, the bank manager inserted the date " February 28 " in the instrument of appointment and went with the receiver to the company's office at Maidenhead, where they arrived at about 11 a.m. The bank manager first saw the company's managing director alone, without the receiver being present. He informed him that he had bad news for him, as the bank required repayment of the company's debt, and handed him the two letters addressed to the company by the debenture holders and requested him to read them, which he did. There then followed a discussion between the bank manager and the managing director which lasted for about 15 minutes, at the end of which the receiver came in and was introduced by the bank manager to the managing director. During the next 10 minutes or thereabouts, a further conversation took place, mainly consisting of an account by the managing director of the difficulties experienced by the company. The bank manager then said: "The fact remains that Mr. Greenwood is to be "appointed receiver," and thereupon handed to the receiver the deed of appointment. The receiver then handed to the managing director a letter dated February 28, which he had signed and brought with him, in the following terms: "Dear Mr. Wood, I "wish to inform you that I have today been appointed receiver "of the Windsor Refrigerator Co. Ltd. under a series of debentures in favour of the bank. You will, of course, appreciate that "I shall have to be responsible for the running of the company "during my period of office. I trust that with care and co-operation from all concerned the company will emerge from its "difficulties and after my release as receiver continue trading and "go from strength to strength. Yours sincerely, Philip C. "Greenwood." The meeting then continued until about 1 p.m.

The plaintiff company issued a writ claiming against the debenture holders, the bank and the receiver, a declaration that the appointment of the receiver was invalid. By the particulars of their defence the defendants stated, inter alia, "(e) The requests "for the preparation of the formal demand and the sealing of the "instrument of appointment were made by the bank (through its "advance department) with the intention thereafter of procuring "the said demand to be served on the company and the said "instrument of appointment to be dated and delivered to Mr. "Greenwood so as to effect his appointment as receiver. The "debenture holders complied with such requests (as they were "bound to under clause 2 of each of the said agreements) in the "knowledge that such was the intention of the bank and in order "to enable such intention to be carried into effect and the bank "had the express or alternatively implied authority from the "debenture holders on their behalf to serve or procure the serving "on the company of the said demand and to date and deliver to "Mr. Greenwood the said instrument or procure the same to be "so dated and delivered. It was not the intention either of "the debenture holders or the bank that the said instrument "of appointment should have any effect until so dated and "delivered." It was further stated in the particulars that the bank manager, in handing to the receiver the deed of appointment, was exercising on behalf of the bank the authority which the bank had from the debenture holders as stated in paragraph (e) above.

On May 27, 1959, the following was ordered to be set down for argument as a preliminary point of law before the trial of the action: Whether the procedure set out above was invalid to effect the appointment by the debenture holders of the receiver on February 28, 1958, by reason of any of the following facts: (1) the debenture holders had sealed on February 25, 1958, an undated instrument of appointment prior to any demand being made on the company for payment of the principal money secured by the debentures or of the sum owed by the company to the bank; (2) the bank sent the instrument of appointment to their branch manager with instructions (a) to demand from the company at their registered office payment of the principal money, (b) to date the instrument, and (c) failing immediate payment, to hand the instrument to the receiver; (3) the bank manager on February 28, 1958, inserted the date into the instrument before making a demand for payment; (4) the bank manager on February 28, 1958, made a demand for payment to the company's managing director at its principal place of business and did not receive payment; and (5) the bank manager thereupon handed the instrument to the receiver.

On the trial of the preliminary point Cross J. assumed (on the construction of the particulars of the defence) that if the instrument of appointment was delivered at all on February 25, 1958, it was delivered subject to the following conditions: (1) that Greenwood agreed to act on acceptable terms; (2) that a demand for payment was made by Inkin and not complied with; (3) that Inkin dated the deed; and (4) that Inkin handed the deed to Greenwood after the demand was made and not complied with. His Lordship further assumed that Inkin was acting as an agent for the debenture holders, and that his instructions could have been countermanded at any time. On these assumptions his Lordship decided that the document was not effective to appoint Greenwood as receiver. The defendants appealed.

John L. Arnold Q.C. and *L. J. Morris Smith* for the defendants. The document was executed with due formality by the two directors who were properly authorised to witness the affixing of the seal on February 25 by signing the document. It was delivered by Branch Nominees Ltd. when Inkin handed it to Greenwood because he was acting as their agent and it was effective to appoint Greenwood receiver. His general authority is conceded in the pleadings.

The decision of Cross J. did not rest on the ground, now submitted by the plaintiff company, that the execution of the document preceded the moment at which the power to appoint a receiver arose and that, therefore, the appointment was void. The judge said that the appointment was a nullity because, during the interim between the date when the document was prepared and the date when the demand would be delivered and not complied with, Branch Nominees Ltd. could have recalled it.

It was executed against the background of an intention that it was only to operate to effect the appointment of Greenwood as from the date when it was handed over. Admittedly, it would have been a nullity if it had lacked the name of the receiver.

[THE COURT inquired whether at the trial the plaintiff would seek to say that, on the evidence, the demand had not been made at the time when the appointment purported to be made.]

[*Muir Hunter* (intervening). The form of the defence appeared to raise a question of law capable of being decided as a preliminary point and the case was conducted before Cross J. with the consent of both parties on a certain footing. The defendants could have taken the point that the matter should be left until the trial of the action. If the preliminary point is decided against the plaintiff, then the evidence can be gone into at the trial.]

[LORD EVERSHED M.R. The procedure by a preliminary point of law is in general only satisfactory when whichever way it is decided it is conclusive of the whole matter.]

When the directors witnessed the affixing of the seal, it was intended that, if the money was paid, the document should not take effect. Similarly, if Greenwood had, for example, been dead when the deed was executed, it could never have taken effect and it would have been a nullity, but it could not have been badly executed.

[HARMAN L.J. Why did not Branch Nominees Ltd. make a confirmatory gesture immediately the appointment was questioned?]

Advice was taken as soon as the difficulty was first suggested, but the damage, if any, had accrued by then. Where a power to appoint depends on a demand for payment not having been

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complied with, there is an obligation to wait a reasonable time, but the validity of the appointment is not affected in this case because there is no obligation to wait. The decision that the instructions could have been countermanded is wrong on the facts, for, as soon as the document was executed, it passed wholly from the control of Branch Nominees Ltd. and they could not have recalled it. The decision is also unsupported by authority. [Reference was made to *Beesly* v. *Hallwood Estates Ltd.*[1]] *Foundling Hospital* (*Governors and Guardians*) v. *Crane* [2] is distinguishable. Each of the companies was a separate entity and the executing company is the only one to which one may look. Branch Nominees Ltd. were acting as trustees for the bank and they were obliged to act at the direction of the bank.

The dating back of an escrow is confined to matters of title. Where the escrow passes an estate, the instrument is executed on such and such a day against the condition occurring later, and when it occurs the estate vests as from the earlier date. The performance of a condition making a deed take effect does not, however, have the result that it takes effect as from the date of execution. There is no case in which a document was held to be invalid by the doctrine of relation back.

Alternatively, it is submitted that this was an effective appointment "by writing." The only flaw that the judge found in the execution of the document as a deed was the lack of delivery. The decision is not founded on a finding that the seal was not properly affixed or that the directors had acted ultra vires their powers in actually writing their names on the document. Whether the signature by the directors was duly authorised by the company or not, the affixing of the seal and names of the directors identifies the piece of paper as a writing by the company and satisfies condition 12. A writing can have conditional effect analogous to the conditional effect of an escrow, but this document was not intended to have effect at all until it was handed over to Greenwood. It was only a piece of paper until then. Although it was retained by one party, that is immaterial. It might have been handed over and yet still have remained a nullity if the event on which it was to take effect never happened. *Davies* v. *Jones* [3] shows that an instrument in writing may operate from a date later than the date when it is delivered, or is brought into existence in a physical sense, as in *Al Baker* v. *Alford.*[4]

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[1] [1961] 2 W.L.R. 36; [1961] 1 All E.R. 90, C.A.

[2] [1911] 2 K.B. 367, C.A.

[3] (1856) 17 C.B. 625.

[4] [1960] A.C. 786; [1960] 3 W.L.R. 121, P.C.

Where in order to have practical effect it has to be communicated, it is easy to conclude that as a matter of law it is only to have effect when it is communicated.

In re Tahiti Cotton Co., Ex parte Sargent [5] shows that an intention that a document should operate as a deed is not fatal to operation as a writing. An intention to create an instrument under seal is not equivalent to an intention to create a deed. The fact that the company's seal was affixed otherwise than in breach of duty is sufficient identification of the document with the company to make it the company's document: Blackstone's Commentaries, Book 1, Ch. 18, p. 475: Characteristics of corporations. It is not suggested that the mere affixing of the seal to a document is per se sufficient to constitute a valid execution, but where, as in the present case, one finds the seal affixed with the authority of a resolution of the board, that is more than sufficient to entitle the corporation to say that it is a writing by the company. In a proper case a document can be sufficiently identified with the company by showing that the company's name had been affixed by a rubber stamp: see *McDonald* v. *Twiname (John) Ltd.*[6] A company can now indicate its mind otherwise than under seal or as provided by section 74 (2) of the Law of Property Act, 1925. Section 74 was not intended to be exhaustive but merely enabling. There can be a simple contract by writing of the directors and anything suffices if it identifies the paper as a writing of the corporation. The present trend is to simplify formality. It is immaterial that this document was stamped as a deed—that could not alter its character. This is the company's writing and was adopted by the company. In the pleadings the document is called a "deed," but it is not necessary to amend that, for the document is sufficiently identified. In the request for particulars reference is made to the document as being "wrongly "described as a deed," so that the point has been sufficiently taken. The articles were relevant on this point (which arose for the first time on the reply before Cross J.), but an application to refer to them was refused.

[Counsel was stopped on other points.]

Muir Hunter and *David Graham* for the plaintiff. (On the assumption, as requested by the court, that the document did not operate as a deed.) It is conceded that the wording of the debenture would be apt to enable the debenture holders to appoint by writing, which would require authentication in some way appropriate to the purpose. For some purposes a corporation's seal could be regarded as its signature. A rubber stamp would not necessarily suffice. If, however, the directors intended to execute a deed, they would be barred from contending that it was a writing. If, for example, a question of stamp duty arose, it would not avail against the Revenue to say that it was preferred that the document should be regarded as an instrument in writing or under hand. Throughout, the bank and Branch Nominees Ltd. were of opinion that the document was a deed in the strict sense. It was stamped as such and was executed in a form indistinguishable from a deed. One can see good ground why a deed should be used in making this appointment. The pleadings are founded entirely on the premise that this was a deed and that the gap between the date when the seal was affixed and the deed of appointment perfected was to be bridged by the doctrine of escrow. That point was argued fully before Cross J., and the point that this is a writing cannot be taken now. Branch Nominees Ltd. were the "person" authorised to appoint but the bank was not the agent for the purpose of handing the document to the receiver. Inkin was only the agent of the debenture holders to the extent and for the purpose of receiving the payment. The appointment is regulated by the Companies Act, 1948, and it is a question how far that can be affected by the words of the particular instrument. This debenture is in common form. [Reference was made to *Thompson* v. *McCullough*.[7]] The exercise of the power must be construed strictly against the debenture holder: see Lord Blanesburgh in *Hunter* v. *Hunter*.[8] He must show that it was exercised by writing and after the money became payable. It is, perhaps, not necessary that the appointment should all be written out after the demand has been made, but it would not be a valid appointment if the debenture holder does not initial the document after the demand is made. It is not open to the debenture holder to prepare the appointment and to keep it by him to produce at the proper moment to the receiver. The appointment so prepared would not take effect as from the date when it was produced. There is a distinction between the relation between a debenture holder and his receiver and a mortgagee and his receiver. [Reference was made to section 109 of the Law of Property Act, 1925.] The appointment of a receiver affects third parties as well as making a fundamental change in the rights and liabilities of the company. The company is ousted from its assets and statutory consequences follow.

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[5] (1873) L.R. 17 Eq. 273.

[6] [1953] 2 Q.B. 304; [1953] 3 W.L.R. 347; [1953] 2 All E.R. 589, C.A.

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[7] [1947] K.B. 447; 63 T.L.R. 95; [1947] 1 All E.R. 265, C.A.

[8] [1936] A.C. 222, H.L.

The rights of the receiver attach immediately on the execution of the appointment and it may not be possible to communicate. Notice of the appointment has to be communicated to the registrar of companies within the statutory period. If it is not communicated, an offence may be committed but the appointment would not be invalidated. [Reference was also made to section 94 of the Companies Act, 1948.] One has to ascertain the moment of time in the contemplation of the legislature when the appointment was made and becomes effective: section 102. Communication is purely ministerial and has nothing to do with the rights which are exercisable once the power has been exercised. When the power is produced it takes effect as from the date of execution. Similarly, a receiver could be removed effectively although he had not been notified.

[DONOVAN L.J. The form differentiates between the writing or instrument and the appointment.]

The writing referred to by clause 12 is the act of inscribing a paper and ending with a signature, bearing a resemblance to the instrument referred to in clause 12, and the date of that is the date of appointment. The date in this case was filled in before the demand was made. The debenture requires an indisputable act of appointment after the date when the demand has been made and not complied with. Handing over a piece of paper or merely filling in the date is not sufficient. The only act satisfying the debenture was done on February 25 and there was nothing thereafter. For the act on February 25 to be effective, the defendants must show that the seal was affixed with the intention of appointing the receiver. [Reference was made to *Kasofsky* v. *Kreegers*.[9]] If the alleged act of appointment consists of more than one act, one before and one after the power arises, that brings in the previously existing piece of paper authenticated by the debenture holder's signature. With a mixed appointment one does not look only at the second act; that act relates back to the date when the seal was affixed. A writing is as vulnerable to attack by relation back as an escrow. No unmixed act of appointment was made after the date when the power of appointment arose. *Kasofsky* v. *Kreegers* [9] shows that the time of appointment may be material, for the creditors may say that the receiver was never appointed to their detriment; that he never had any rights and must pay back the money distributed. The only true guide is to see when the power of appointment arose and then to see what acts of appointment have been made afterwards. That avoids having to decide the intention of the debenture holders. If the debenture holder fails to carry out the terms of the debenture with strict precision or to comply with other requirements he must fail. In this case, on hypothetical facts, the court is asked to consider whether the appointment could have been validly made, and it can make reasonable commercial assumptions as Cross J. did. The authorities on the appointment of trustees are not relevant.

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[9] [1937] 4 All E.R. 374, D.C.

The powers conferred on a receiver by clause 12 (2) amount to an interest in land, which, by section 52 of the Law of Property Act, 1925, must be conferred by deed. It may be argued that one can look at the debenture for the deed in question, but it is submitted that the instrument conferring the estate contemplated by the debenture must itself be by deed.

In this instrument the words " by writing " are, therefore, to be construed as being equivalent to " by deed," for the general law overrides the construction which might be put on the wording of this particular debenture. A receiver appointed by the court is in a special position. A statutory receiver can be appointed under hand but a debenture holder's receiver has to be in a position to prove that he has an interest in land conferred on him in order to bring proceedings for possession in his own name. He is appointed to be " the company."

LORD EVERSHED M.R. We need not trouble you, Mr. Arnold. This action is of a somewhat unusual character; and though the writ in it was issued in the month of June, 1958, it has now come before this court on appeal from Cross J.'s decision upon a submission made pursuant to an order of May 27, 1959. The form of that order, so far as relevant, is as follows: " And it is " ordered that the preliminary point of law raised by paragraph 8 " of the defence and paragraph 4 of the said draft reply be set " down to be argued before this court as a preliminary point of " law before the trial of this action, that is to say, whether the " procedure described in paragraphs 5 and 8 of the defence read " with the further and better particulars thereof delivered on " February 24, 1959, was invalid to effect the appointment by " the defendants, Branch Nominees Ltd., of the defendant, "Philip Clarkson Greenwood, on February 28, 1958, to be the "receiver under their debentures by reason of all or any of the "following facts that is to say." There then follow five further paragraphs of facts or assumed facts.

From what I have said it will be apparent that the nature of the action is to challenge the validity of the appointment of the defendant Greenwood as receiver of the property of the first plaintiff, Windsor Refrigerator Co. Ltd., the appointment purporting to have been made under the powers in certain debentures which were issued by the Windsor company in favour of Branch Nominees Ltd. by way of security for moneys which the Windsor company owed to their bankers.

The plaintiffs challenge the validity of the appointment, and sue, accordingly, for damages against the defendants including the receiver. As I have said, it is a very unusual form of action, but I daresay none the worse for that. On the other hand, I do venture to echo and emphasise what Cross J. said in his judgment: "The fact that there was this dispute"—and that refers to certain disputes as to facts—" between the parties shows how "unsuitable this form of procedure is for the determination of a "question of this sort." It is no doubt easy to be wise after the event; and I do not want to be thought offensive in any sense at all to those who drafted the order if I say that its language is a little startling—" whether the procedure " described "was invalid "to effect the appointment," etc.

I shall not take up time in reading all the facts which are referred to expressly or by inference, but one of the particulars under paragraphs 5 and 8 of the defence was as follows: "The "requests for the preparation of the formal demand and the "sealing of the instrument of appointment were made by "the bank (through its advance department) with the intention "thereafter of procuring the said demand to be served on the "company and the said instrument of appointment to be dated "and delivered to Mr. Greenwood so as to effect his appointment "as receiver. The debenture holders complied with such requests "(as they were bound to under clause 2 of each of the said "agreements)"—that refers to contemporary agreements made when the debentures were issued—" in the knowledge that such "was the intention of the bank and in order to enable such "intention to be carried into effect and the bank had the express "or alternatively implied authority from the debenture holders "on their behalf to serve or procure the serving on the company "of the said demand and to date and deliver to Mr. Greenwood "the said instrument or procure the same to be so dated and "delivered. It was not the intention either of the debenture "holders or the bank that the said instrument of appointment "should have any effect until so dated and delivered."

Suffice it to say that for the purpose of determining the so-called preliminary issue, what I have read was to be assumed, and it has become quite manifest that those circumstances which I have narrated are by no means conceded. Very briefly, it is said by the defendants that the following course of events took place: On February 25, 1958, Branch Nominees Ltd. (who were the debenture holders, but who are a company wholly owned by the Windsor company's bankers, the National Provincial Bank Ltd.) proceeded to affix the seal of the company to an instrument in the following terms: "We, Branch Nominees Ltd., being the "registered holders of the debentures referred to in the schedule "hereunder written and under and in accordance with the "provisions of the conditions endorsed upon the said debentures "and all other powers us enabling hereby appoint Mr. Philip Clarkson Greenwood, A.C.A., to be receiver of the undertaking and all "of the property and assets of Windsor Refrigerator Co. Ltd. "comprised in and charged by the said debentures upon the "terms and with and subject to the powers and provisions con-"tained in the said debentures"—and then there was a reference to remuneration—"as witness our common seal this (blank) day "of (blank) 1958." The affixing of the common seal was on the face of the document witnessed by two gentlemen of the names of Brooks and Wheeler, who are said to be directors of Branch Nominees Ltd.

That was on February 25, 1958. According to the defendants' story, after correspondence passing between Branch Nominees Ltd., the bank, and also to some extent the Windsor company, a Mr. Inkin, who was the manager of the local branch of the bank which kept the Windsor company's account, at about 20 minutes past 10 on the morning of February 28, filled in the figure "28th" and the word "February" where the blanks occur at the end of the document of appointment. He then proceeded, in the company of Greenwood, to go to the office of the Windsor company. Greenwood remained decorously outside for a short period. When Inkin saw Wood, the managing director of the Windsor company (according to the defendants' story) after expressing suitable condolence he demanded payment of what was due to the bank, or alternatively under the debentures. Having made that demand, which not surprisingly was not then and there met, there entered Greenwood. Thereupon Inkin handed to Greenwood the document which I have read, and thereby (again according to the defendants' story) indicated that he (Greenwood) was appointed receiver by virtue of the powers in the debenture; and Greenwood thereupon proceeded or began to proceed so to act. In the 2½ years that have elapsed since that event, it seems that one result has been that the existing overdraft of the bank has been somewhat more than doubled; and in order to protect what there is to protect, Greenwood has since been appointed receiver by the court.

The debentures are in a form common enough, and contain in condition 12 the following: "(1) At any time after the principal "moneys hereby secured shall have become payable the registered holder of this debenture may at any time appoint by "writing any person or persons to be a receiver or receivers of "the property charged by this debenture and may from time to "time by writing remove any receiver so appointed and appoint "another in his stead." Sub-condition (2) states what the receiver's powers are, and to those I shall return briefly hereafter. There cannot be, of course, any doubt that the document to which I have referred as the appointment was intended—at least I should have thought there cannot be any doubt—to be a deed. That view is supported not only by the fact that the common seal of the company is affixed in the presence of two directors, but also by the fact that it was stamped as a deed with a 10s. stamp, and is referred to as a deed of appointment in various letters which are before the court, but which I need not read.

The first challenge which the plaintiffs have made (and which has been agitated on this issue) is that the deed was for the purposes intended wholly ineffective. That argument, which found favour with Cross J., was based on certain considerations; and before I state them it is right that I should say at once that upon this part of the case we did not hear Mr. Arnold fully in argument, and we have not heard Mr. Muir Hunter at all. But the basis of the attack rested upon this: This appointment must in the circumstances have one of three possible results. In the first place it operated (and was intended to operate) without qualification as a deed executed and delivered on February 25, 1958. If that was the result, then it is conceded, as I follow, that it must have been ineffective to appoint Greenwood, because at that date no demand for payment under the debentures had been made. Another view is that it was executed and delivered not as a deed, but as an escrow—that is to say, that its operation would be suspended pending the fulfilment of whatever was or were the condition or conditions implicit in the execution as an escrow. To that possible view I will return in a moment. The third (and it was on this ground that Cross J. based his decision) is that the deed, though executed, was executed subject to the suggested condition that pending the delivery of a demand, and its not being satisfied, Branch Nominees Ltd. could at any moment recall it. If that were the effect, then it was not a deed, it was nothing; and for that view Cross J. cited *Foundling Hospital (Governors and Guardians)* v. *Crane*,[1] which was also cited in a recent judgment of this court (*Beesly* v. *Hallwood Estates Ltd.*[2]). If either of the first and third effects was achieved by this document, then, as I understand, the results are not in doubt, and those results would be fatal to the defendants.

There remains the possibility of the escrow, and that raises the problem what were the conditions upon which the deed was so executed. In view of the fact that we have not heard fully this part of the argument and (consequently) since I shall not myself express any concluded view upon it, I do not propose to go into it at length. But the judge indicated [3] that there were, or might have been, four conditions, fulfilment of which was necessary before the deed took effect as such, namely, first, Greenwood agreeing to act on acceptable terms; second, demand for payment made by Inkin, but not complied with; third, that Inkin dated the deed; and fourth, that he handed the deed to Greenwood after the demand was made, and not complied with.

In addition to other difficulties in the defendants' way on this part of the case, there is this further point which I mention, but upon which again I express no view, that if this instrument was executed as an escrow subject to some or all of the conditions made or other conditions, then upon the fulfilment of the condition or conditions prima facie, so it is argued, it would become retrospectively operative from its date or the date when it was actually executed, namely, February 25. Mr. Arnold indicated, but did not pursue the point, that that general principle would not apply in a case of this kind. If it did then, of course, again the result would be fatal to the defendants, for on February 25, 1958, beyond a peradventure, the power to appoint a receiver had not arisen, there having been no demand.

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[1] [1911] 2 K.B. 367, C.A.

[2] [1961] 2 W.L.R. 36; [1961] 1 All E.R. 90, C.A.

[3] Ante 88; [1960] 3 W.L.R. 108; [1960] 2 All E.R. 568.

As I have indicated, however, Cross J. based himself upon the third possible result of the instrument in the circumstances. " I prefer, therefore," he said,[4] " to rest my decision on this part " of the case on the ground that a deed cannot be delivered as an " escrow at all subject to an overriding power in the grantor to " recall the deed altogether, rather than on the fact that on " February 25 the debenture holders had no power to make an " unconditional appointment."

I propose to say no more upon this aspect of the case, but to mention only this further matter. Though this point of law has been tried as a preliminary issue on various elaborate hypotheses, few of them appeared to be matters of undisputed facts. But I assume it will be a point to be decided at the trial what exactly did happen in the board room or other office of Branch Nominees Ltd. when the common seal of the company was affixed to this instrument in the presence of Brooks and Wheeler, and some conclusions may be drawn from the evidence of what then occurred, or was said or recorded. But for the purpose of the rest of my judgment I shall assume that on the grounds stated by the judge, or for some other good reason, this instrument was ineffective at any relevant date as a deed for the purpose of making any appointment of Greenwood or otherwise.

On that basis Mr. Arnold then developed his alternative argument, which was that although the instrument might not be a deed, still it was an instrument in writing; and since what the debenture required was appointment " by writing," it would suffice to satisfy the condition albeit that it was ineffective (for its survival) for any purpose as a deed. I emphasise at once the two words " by writing " because, according to the judgment of Cross J., this alternative appears to have been put somewhat differently before him. What was argued and decided was not whether this instrument operated as a writing sufficient to satisfy the condition, but whether it could be treated as a document under hand, which I conceive is not the same thing, or at least not necessarily so.

Cross J. rejected that argument. He was content to assume first, that the condition might not require appointment by deed; second, that by virtue of the Law of Property Act, 1925, the directors of Branch Nominees Ltd. could have appointed an agent to execute on their behalf a document under hand; third, that such an appointment under hand by an agent could have been made, with the effective intention that it should not bind unless certain events happened, including the prior making of the demand, etc. In other words, it did not have the disability in this respect that a deed executed as an escrow might have. But Cross J. stated[5]: "If this appointment cannot take effect as an "escrow, I ought to treat it as being equivalent to an appoint-"ment under hand made by the directors, who signed it as agents "for the debenture holders" and the judge decided the question adversely to the defendants upon that last point. He said[6]: "I am prepared to accept proposition (3), but I am quite unable "to see how the facts, which I must assume to be correct, justify "proposition (4). The debenture holders were asked by the bank "to prepare and seal a deed. I have not seen any resolution of "the board of debenture holders, but I assume that it accorded "with this request. I have, therefore, no reason to think that "the two directors who put their names on the appointment were "authorised to do anything else than to witness the affixing of "the seal. I cannot assume that they had any authority to bind "the company by a document under hand or were purporting "to do so."

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[4] Ante 88, 103; [1960] 3 W.L.R. 108, 119.

It seems to me that the point as it has now been developed is not the same point as was in the mind of the judge, and which was decided by him. The question is not whether these two gentlemen, when they put their names on this document, were purporting to execute a document under their hands as agents for the company, or had any authority so to do. The question, as I conceive it to be, is: Can this document purporting though it may have been originally to operate as a deed, but failing so to do—can it nonetheless be the instrument of the company in writing? I have come to the conclusion that that question ought to be answered in the affirmative. So to decide is not, of course, to decide—far from it—that Greenwood's appointment was valid. There remain matters of fact plainly in issue, and all that we can say, as it seems to me, is that assuming those facts are found eventually in a sense which would be favourable to the defendants' case, then this document could operate as an instrument in writing within the contemplation of condition 12 of the

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[5] Ante 88, 104; [1960] 3 W.L.R. 108, 120.

[6] Ibid.

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debenture so that it could be said by the defendants that Branch Nominees Ltd. had by writing appointed Greenwood.

But in order to make clear the limitations of what I am saying, I must also make plain what would have to be the necessary basis of fact before such a conclusion could be reached. I will repeat that the question of what did happen on February 25 might have some reflection upon later events. But in addition it will be first plainly necessary to establish as a fact that before anything was done which could be called an appointment on February 28, there had been a demand. I gather from Mr. Muir Hunter that that fact is by no means conceded, and that someone will have to prove it. If a demand were made, it was made, as I assume, by Inkin, the branch manager; but Inkin was the officer of the National Provincial Bank Ltd., and not of Branch Nominees Ltd. So there is the second question: Had he authority to make the demand not as manager of the National Provincial Bank (Reading Branch) but as agent for the debenture holders, Branch Nominees Ltd.? That is a further question for investigation. Then assuming that he did make demand, and had authority to make it for Branch Nominees Ltd., what then happened? The suggested events, according to the defendants—which I have perhaps already sufficiently indicated—are that after the entry of Greenwood into the room, the document was handed to Greenwood, and some words were used which were understood to mean (so they say) that thereupon Greenwood was appointed. Once more, that will have to be gone into at the trial.

But if all those facts are established in a way which is in support of the defendants' case, then as I have indicated it appears to me not fatal to the defendants' case that this appointment started by being (or by being intended to be) a deed, but was ineffective so to be. I conceive that if an individual sets out to execute a deed, and for some reason the instrument is not effectively a deed (say, because of the absence of a seal, or the absence of attestation) it cannot be said that therefore it is not, and cannot be, an instrument in writing, and his instrument in writing. Mr. Muir Hunter has argued that in considering matters of this kind, one must apply a strict construction and a construction that is adverse to the debenture holders on the language of condition 12 of the debenture. I am not quite sure what the precise effect of that submission is. The words are quite simple words: "Appoint by writing"; and in construing them it is fair to note that the condition also empowers the debenture holders by writing to remove. I should have thought that those words would be satisfied if something was done—if the person acting for the debenture holders so conducted himself that one could say that he was appointing someone to be a receiver, and if he accompanied that by handing a writing which was the company's writing to the receiver. That would satisfy the condition. I am not by any means saying that that would be the only way to do it, but that is the relevant alleged course of events here.

But Mr. Muir Hunter says: No: This writing came into existence when it was made on February 25, and when the two directors, Brooks and Wheeler, then appended their signatures to the affixing of the seal, and thereby for present purposes identified it as the company's writing. He says that the subsequent putting in of the figure "28th" and of the word "February" again before the demand, does not affect that proposition, and that even if it did, it would mean that the writing was complete and (if at all) effective as such at that point of time.

The point is a short one, but in my judgment those propositions are not well founded. I agree with Cross J. when he accepted, as I understand that he did, that in the case of a writing it is perfectly competent that it should be made out, that it should come into existence on a day before it is intended to take effect, and does take effect. The contrary view would seem to have startling results, because assuming a power to appoint in writing, a man might make a document, lock it up in his desk with the idea that he was not wanting to use it at the moment, but there it was available if he did want to use it, and years might pass. According to Mr. Muir Hunter, when it was produced, it would have been effective from the date when he had made it and put it in his desk. That appears to me an absurd and unreal result of the argument which I do not think is the law.

Mr. Muir Hunter took a final point, namely, that notwithstanding the words which I have read in condition 12, the true construction of the condition is that "by writing" should be read "by deed." That argument, as I follow it, is based upon the view that, as appears from what follows in sub-condition (2), powers are given to the receiver so appointed which would involve the vesting in him of some estate; and if that is right, then a deed is necessary, and one should construe the words "by "writing" as, therefore, meaning, in the light of what follows, "by deed." I am afraid I am quite unable to accept that

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argument. I do not accept the view that there was any vesting of an estate contemplated as the result of the appointment. But even if some such matter arose, that would be a question to be decided after the appointment, for example, whether the receiver, not having been appointed by deed, had in law the authority to do something which he thereafter purported to do. We are not at this stage concerned with that at all.

For the reasons that I have stated, I conclude that the answer to this case is that on the assumptions of fact which I have indicated—which can be determined only in the action—this instrument would be capable of being a writing as contemplated by the debenture taking effect on the date (February 28) when it was in fact, according to the defendants, passed over to Greenwood after a demand had been made by Inkin with the authority of the debenture holders.

I would, therefore, order accordingly, and set aside the judgment of Cross J., though, as I say, I do not express any view upon the matter with which he expressly dealt, namely, whether the document took effect in the circumstances (or was capable of taking effect) as a deed. I repeat what I said at the beginning, that the course which this matter has taken emphasises, as clearly as any case in my experience has emphasised, the extreme unwisdom—save in very exceptional cases—of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the shortest cut so attempted inevitably turns out to be the longest way round.

HARMAN L.J. I concur, and find myself doing so with particular heartiness with reference to the last observations my Lord has made. The number of conditions he has found it necessary to use to fence in the expression of this court's opinion shows at once the undesirability of this kind of procedure. It is highly undesirable that the court should be constrained to tie itself in so many knots, and in the end merely say: "Well, "if this was thus, then that was so." In particular here one has no notion what authority (if any) Inkin, the servant of the bank, had so far as he was (if at all) the agent of the debenture holders. Had he authority to demand the mortgage money? Had he authority to make the appointment? One has no idea at all. But those are only two of the questions which are left unresolved by the case as it now stands.

As my Lord has observed, we have not had fully argued out the point about the delivery of this instrument as an escrow.

But the judgment appears to show the judge to have held that a document can only be an effective escrow if, on its delivery, it becomes irretractable by the grantor while the conditions attached to it remain unperformed. That statement of the law seems to be consonant with a decision of this court in *Beesly* v. *Hallwood Estates Ltd.*[7]

I assume, therefore, that on this point the judge was right.

The other point, namely, whether the document was operative in law as an appointment in writing, was not really argued before Cross J. as it has been before us. He came to the conclusion that these two directors had authority only to execute, or to witness the execution of, a deed by the company, and that as that did not authorise them to execute or sign a document under hand, that was an end of the matter. But with all respect, the appointment need not be under hand. There was no need for any signature here. The two directors were authorised to do that which they did, and having done it, whether that instrument so brought into being operates as a writing is for the court, and is not a matter of their authority at all; and my Lord has expressed the view, in which I concur, that this document on the face of it could operate as an appointment in writing. Whether it did so depends on a number of facts to which we do not know the answer. All we can say, therefore, is that it could so operate.

Mr. Muir Hunter's assumption that you must write it all out after the demand is made, and you are not entitled to carry a piece of paper in your pocket with the words written on it, and produce that piece of paper if and when you need it, seems to be an absolute novelty, and not convenient in practice, or right in law. I can see no reason why you should not write down certain words on a piece of paper and keep them in your bosom or your pocket book, and produce them at the right moment. Nor do I see why, if you so produce them, they should not have effect at the moment when you do produce them to the proper person, here to the receiver. Regarded as a document in writing, the document is not a conditional appointment at all. When the words were written on February 25, they were written without any intent that they should have any present effect and merely in preparation for a day which might, or might not, arrive. But when it did arrive it seems to me that (if Inkin had the necessary authority) the production of the document, and the handing of it to Greenwood with an intimation that this was his appointment as receiver, would constitute a good appointment by writing; and to that extent, therefore, we must differ, I suppose, from the judge, although over ground which he had never really traversed. Nevertheless, to that extent the appeal must, in my judgment, be allowed, and some kind of declaration made that, in various events which might have happened, this instrument could be effective for its apparent purpose.

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[7] [1961] 2 W.L.R. 36.

DONOVAN L.J. In the way in which this case has come before the court, and has been argued here, it seems to me that two questions arise: First, whether the document purporting to appoint the receiver is such a " writing " as satisfies condition 12 of the debenture; and secondly, whether, if so, the appointment was invalid as being premature.

As to the first question, I can see no answer to the defendants' contention that, if the document cannot properly operate as a deed, it certainly can do so as a writing; and I need say no more upon this point than my brothers have said already, with which I agree.

As to the second question, the argument is that the receiver was appointed the moment the document was signed, and so before the debt became payable. I agree that in a context where precision is not required, one might speak of the document loosely as appointing a receiver. But in this context precision is required. What the debenture holder wants to do is to levy equitable execution, and for that purpose to have some person in being clothed with the necessary authority to take possession of the company's property, to carry on its business, to act in its name, and pay the debt; and the company has to submit to the exercise of these powers by the person having such authority.

This state of affairs is not achieved simply by the debenture holder signing a document in privacy, and keeping the contents to himself for as long as he wishes. Clearly the contents of that document must be communicated at least to the receiver before his appointment can be said to be effective. One may illustrate this by the converse case of removal, which may also be done under condition 12 by writing. The plaintiff here is driven to argue that the receiver might also be removed by a writing of which he need know nothing. So he would go on managing the company's business, acting in the company's name and receiving the company's property perhaps for weeks before he became aware of the fact that he had ceased to be receiver,

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and had been removed. This seems to me clearly to expose the fallacy of the argument.

On the assumptions that we are asked to make, that is, that the receiver was notified of his appointment on February 28, after demand for payment had been properly made, I think the appointment was not premature, and I agree that the appeal should be allowed.

December 7. The case was mentioned to the court and Lord Evershed M.R. expressed doubt whether the court ought to make any order on the appeal on the preliminary points. The judgment of Cross J. should be set aside and his order discharged. The judgment already delivered by the Court of Appeal could, His Lordship said, be used merely as a guide in further litigation. The Court of Appeal ought not to prejudge the issue whether the instrument operated as a "writing," for its effect depended on what was the intention of the parties at the material time. The preliminary point raised questions of fact and law and if, when the matter had come before the court, the court had been sitting at first instance, they would have refused to answer the questions pending the trial.

Judgment of Cross J. set aside.
Costs in the Court of Appeal and the High Court to be the defendants' costs in the action.

Solicitors: *Wilde, Sapte & Co.; Matthew Trackman, Lifton & Cunnington.*

E. D.

INLAND REVENUE COMMISSIONERS *v.* BERNSTEIN.

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Dec. 6, 7, 8, 9.

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Trusts — Power of advancement — Contrary intention — Direction to accumulate income—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 32 (1), 69 (2).

Revenue—Income tax—Settlement—Trust for accumulation during life of settlor—Contingent interest of settlor's wife—Whether statutory power of advancement applicable—Whether income to be treated as income of settlor—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 32 (1), 69 (2)—*Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 405 (1) (2).

By a settlement dated October 16, 1947, a fund was settled on trust to accumulate the income therefrom during the life of the settlor, and after his death on trust as to one-third for the children then living of the settlor by the beneficiary, who subsequently became his wife, and as to two-thirds for the beneficiary absolutely; if the beneficiary died during the lifetime of the settlor the fund was to be held on trust for her children living at his death, but if at the death of the settlor there were living no children of his by the beneficiary, then on trust for the beneficiary absolutely; and if she should die during the settlor's lifetime without leaving any children, on trust for her sister absolutely. The settlor appealed against assessments to surtax for the years 1950–51 to 1953–54 inclusive in respect of income arising under the settlement, and the Crown contended that by virtue of the statutory power of advancement under section 32 of the Trustee Act, 1925,[1] one-half of the property comprised in the settlement might become payable to or applicable for the benefit of the settlor's wife within section 405 (2) of the Income Tax Act,

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[1] Trustee Act, 1925, s. 32: "(1) "Trustees may at any time or times "pay or apply any capital money "subject to a trust, for the advance- "ment or benefit, in such manner as "they may, in their absolute dis- "cretion, think fit, of any person "entitled to the capital of the trust "property or of any share thereof . . . "Provided that—(*a*) the money so "paid or applied for the advancement "or benefit of any person shall not "exceed altogether in amount one-half "of the presumptive or vested share "or interest of that person in the "trust property; . . . (*c*) no such "payment or application shall be "made so as to prejudice any per- "son entitled to any prior life or "other interest, whether vested or "contingent, in the money paid "or applied unless such person is "in existence and of full age and "consents in writing to such payment "or application."

S. 69 (2): "The powers conferred "by this Act on trustees are in addi- "tion to the powers conferred by "the instrument, if any, creating the "trust, but those powers, unless "otherwise stated, apply if and so "far only as a contrary intention is "not expressed in the instrument, "if any, creating the trust, and have "effect subject to the terms of that "instrument."

Income Tax Act, 1952, s. 405: "(1) If and so long as the settlor has "an interest in any income arising "under or property comprised in a "settlement, any income so arising "during the life of the settlor in any "year of assessment shall, to the "extent to which it is not distributed, "be treated for all the purposes of "this Act as the income of the settlor "for that year and not as the income "of any other person: Provided that "—(*a*) if and so long as that interest "is an interest neither in the whole "of the income arising under the "settlement nor in the whole of the "property comprised in the settle- "ment, the amount of income to be "treated as the income of the settlor "by virtue of this subsection shall be "such part of the income which, but "for this proviso, would be so treated "as is proportionate to the extent of "that interest . . .

"(2) For the purpose of subsection "(1) of this section, the settlor shall "be deemed to have an interest in "income arising under or property "comprised in a settlement if any "income or property which may at "any time arise under or be com- "prised in that settlement is, or will "or may become, payable to or "applicable for the benefit of the "settlor or the wife or husband of "the settlor in any circumstances "whatsoever: . . ."

1952, and that, accordingly, one-half of the income under section 405 (1) was to be treated as his income.

The claim made by the Crown was afterwards limited to apply only to the two-thirds of the trust fund in which the beneficiary had a vested interest liable to be divested if she predeceased the settlor. Both the special commissioners and Danckwerts J. decided in the taxpayer's favour and the Crown appealed:—

Held, that the trust for accumulation of income during the settlor's life showed an intention in conflict with the power of advancement conferred by section 32 (1); that section 69 (2) did not require that the power of advancement conferred on trustees by section 32 (1) should be expressly excluded, but that the power was inapplicable if, on a fair reading of the instrument in question, it could be said that the application of the power would be inconsistent with the purport of the instrument; that in the present case the object of the instrument was plainly to build up a capital sum which would be paid out to the beneficiary or her children, if any, on the settlor's death, and that, therefore, section 32 (1) was inapplicable (post, pp. 414, 415, 417). Accordingly, the claim for tax failed and the appeal should be dismissed.

In re Turner's Will Trusts [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435, C.A. applied.

Quaere whether, if the powers of advancement provided by section 32 had been exercisable by the trustees, the interest in income of the beneficiary and her children, if she had had any, would have been prior interests within the meaning of section 32 (1) (*c*) of the Trustee Act, 1925 (post, pp. 415, 418).

Decision of Danckwerts J. [1960] Ch. 444; [1960] 2 W.L.R. 554; [1960] 1 All E.R. 697 affirmed.

Appeal from Danckwerts J.

A settlor, William Bernstein, appealed against assessments made on him to surtax for the years 1950 to 1951, 1951 to 1952, 1952 to 1953 and 1953 to 1954 in the sums of £6,102 (additional), £6,659, £1,338 (additional) and £4,630 (additional), respectively, on the basis that under section 405 of the Income Tax Act, 1952, one-half the income arising under a settlement made by him on October 16, 1947, was to be treated as his income.

The settlement of October 16, 1947, after reciting that a certain sum of money had been paid by the settlor to the trustees thereof, and after making provision for the investment of the trust fund, provided as follows:

" 2. The trustees shall during the life of the settlor accumulate " the income of the trust fund at compound interest by investing " the same and the resulting income thereof in any of the invest- " ments hereby authorised in augmentation of the capital of the " trust fund and for the benefit of the person or persons who " shall eventually become entitled thereto.

"3. After the death of the settlor the trustees shall hold the "trust fund as to one equal third part thereof in trust for all or "any of the children or child then living of the settlor by the "beneficiary [who subsequently became the settlor's wife] (if "more than one in equal shares) and as to two equal third parts "thereof in trust for the beneficiary absolutely but if the beneficiary dies in the lifetime of the settlor leaving children or a "child her surviving then the trustees shall hold the trust fund "in trust for all or any of such children or child who shall be "living at the death of the settlor if more than one in equal "shares absolutely.

"4. If at the death of the settlor there shall be living no child "of the settlor by the beneficiary the trustees shall hold the trust "fund in trust for the beneficiary absolutely but if the beneficiary "dies in the lifetime of the settlor without leaving any children or "a child by the settlor . . . her surviving then the trustees shall "hold the trust fund in trust for Muriel Clara Selina Thoms "sister of the beneficiary absolutely."

The settlor and his wife were both living, they had had no children, and all income of the trust fund had been accumulated in accordance with clause 2 of the settlement.

It was contended on behalf of the Crown that the trustees of the settlement had, under section 32 of the Trustee Act, 1925, power at any time or times to pay or apply for the advancement or benefit of the settlor's wife one-half of the trust fund; that by virtue of such power one-half of the property comprised in the settlement might become payable to or applicable for the benefit of the settlor's wife within section 405 (2) of the Income Tax Act, 1952; that by section 405 (1) and proviso (*a*) one-half of the income arising under the settlement in the relevant years was accordingly to be treated as the income of the settlor; and that the assessments were correct in principle and (subject to adjustment of the figures) should be confirmed.

It was contended on behalf of the settlor that the power of advancement contained in section 32 of the Act of 1925 was not applicable to the settlement, inasmuch as on the true construction of the deed of settlement it contained an indication of a contrary intention (Trustee Act, 1925, s. 69 (2)); that if, contrary to his contention, the statutory power of advancement was to be read into the settlement, such power could not be exercised in favour of the settlor's wife without the prior consent of the persons (born or unborn) who had "prior interests" within section 32 (1) (*c*) of the Trustee Act, 1925; that possible children of the settlor by his wife had such "prior interests," and their consent being unobtainable at any time during the period of accumulation, the statutory power of advancement could never be exercised in respect of the money in which such children had such prior interests, and that those interests extended to the income of the whole of the trust fund and the accumulations of the income and, alternatively, in one-third of the trust fund; that the settlor could not be deemed to have an interest in the income arising from the settlement within section 405, and that the assessments under appeal should be discharged.

The commissioners considered that the statutory power of advancement in section 32 of the Trustee Act, 1925, was not inconsistent with any express provision of the settlement and should be read into it, but that unborn children had interests in the whole of the capital of the trust fund which were "prior interests" within proviso (*c*) to section 32 (1). Since the Crown did not dispute that if that were right no advancement could be made owing to the impossibility of obtaining consents, the commissioners allowed the appeal and discharged the assessments.

On the appeal by the Crown the claim was revised and it was contended that the power to advance to the settlor's wife provided by section 32 would be limited to one-half of the two-thirds of the trust fund in which she had a vested interest liable to be divested if she predeceased the settlor.

Danckwerts J. decided in favour of the taxpayer that the trust for accumulation during the settlor's lifetime sufficed as a "contrary intention" within section 69 (2) of the Trustee Act, 1925, to negative the powers of advancement contained in section 32, but that (if those powers had been exercisable) as regards the two-thirds interest, the consent of the unborn children would not have been required to an advancement for they were not "prior interests" within section 32 (1) (*c*).

The Crown appealed.

The Hon. B. Bathurst Q.C., *E. Blanshard Stamp* and *Alan S. Orr* for the appellants, the commissioners. A contrary intention must be expressed in the instrument to come within section 69 (2). An implied intention is not sufficient.

[Donovan L.J. referred to *Vestey's Executors* v. *Inland Revenue Commissioners*.[2]]

The matter has to be looked at year by year, and although at the time when this settlement was made the present question could not have arisen because the beneficiary was not then the settlor's wife, she had married him before the time to which the assessments relate. At a subsequent date a deed expressly excluding advancement was executed, but that cannot operate retrospectively. The issue is whether, looking at the matter as it was during the period after the marriage and before the execution of the later deed, any part of the income of the two-thirds of the fund to which the beneficiary would be entitled if she survived the settlor, could have come into her hands during the settlor's lifetime. No claim is now made on the other third of the fund because the first trust of that part was for the children and no advancement of that part of the capital could have been made without their consent.

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[2] [1949] W.N. 233; [1949] 1 All E.R. 1108, H.L.

The taxpayer relies on the trust for accumulation in the settlement. [Reference was made to *Barr's Trustees* v. *Inland Revenue Commissioners.*[3]] Some limitation has to be put on the expression "contrary intention," for in the widest sense any disposition by a settlor might be said to be "contrary" to the statutory power. There are three possible ways of excluding section 32. First, by direct exclusion. Second, the instrument may make some other provision for advancement. Third, the instrument may provide that nothing shall be done by the trustees which will reduce the amount of the capital coming to the reversioner. Upjohn J. in *In re Rees*[4] said that the contrary intention must be "clear." [Reference was also made to *In re Spencer.*[5]]

A power of advancement, unlike a power of appointment, takes the fund advanced out of the settlement for all purposes, and the income from the property taken out of the settlement is not income arising under the settlement. The provisions of the settlement operate on what remains: see *In re Fox*,[6] following *In re Gosset's Settlement.*[7] A trust for accumulation of income is unaffected by the exercise of a power of advancement of capital, although in part the capital advanced may consist of income which has been accumulated and capitalised. [Reference was made to *In re Pilkington's Will Trusts.*[8]] The provision in the settlement for accumulation deals only with income and cannot affect a power limited to the advancement of capital. The onus of proving a contrary intention is on the person alleging it. Prima facie, the section applies. It is conceded that "express" does not mean that the instrument has to state in so many words that the section is not to apply; something which is inconsistent with the power of advancement being exercised would be sufficient, but there is nothing in this case which cuts across the power of advancement. The test is to write the section into the instrument and then to see whether there is anything in it which amounts to a contrary intention. Danckwerts J. applied the wrong test in looking at the practical effect, for the practical effect of advancement must always be to reduce the income.

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[3] (1943) 25 T.C. 72.

[4] [1954] Ch. 202, 207.

[5] [1935] Ch. 533.

[6] [1904] 1 Ch. 480.

[7] (1854) 19 Beav. 529.

[8] [1959] Ch. 699; [1959] 3 W.L.R. 116; [1959] 2 All E.R. 623.

The children's interests are not prior but subsequent. If the instrument requires the consent of someone having a subsequent interest to be obtained before an advancement can be made that might amount to a sufficient expression of a contrary intention. In *In re Beckett's Settlement*[9] no one of the children had any interest either vested or contingent; they were merely the objects of a discretionary trust and their consent was not needed to the exercise of the power of advancement. The discretionary trust in that case did not prevent section 32 from operating, and it is submitted that this case cannot be distinguished in principle. Clause 2 in the present instrument is a simple accumulation clause similar to that given in Key and Elphinstone, 15th ed., vol. 2, p. 635, for an express maintenance clause. The object is to augment capital by accumulating income and then capitalising it.

In this case the court may lean against the Crown, but it must be remembered that this decision will affect the ordinary Chancery case of a trust for the accumulation for the benefit of an infant, where the natural inclination of the court would be in favour of finding that the power of advancement was available.

Except for *In re Turner's Will Trusts*[10] none of the cases cited to Danckwerts J. have any bearing on this case; in that case the court was considering whether section 31 (1) (ii) was an imperative trust or a power. If the latter, it was assumed that a provision for maintenance was a sufficient contrary intention to oust that statutory power. The present question was not really argued and the statement by Sir Mark Romer L.J. at the end of the judgment was merely an obiter dictum. *In re Spencer*[11] was disapproved in that case.

Section 405 is designed to prevent the "rolling up" of income so that it can afterwards be got as capital.

[9] [1940] Ch. 279; 56 T.L.R. 342.

[10] [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435, C.A.

[11] [1935] Ch. 533.

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E. Blanshard Stamp following. Section 69 deals with all sorts of powers and one would expect to find it applying differently to different powers. The power here is different from that considered in *In re Turner's Will Trusts.*[12] In a case such as this, where income and capital are given to the same person, it would be strange if advancement was not intended: contrast *In re Spencer.*[13] Here the person who benefits from the accumulation is the same as the person who would benefit from an advancement. In this case the accumulations of income are given to the beneficiary in priority to the children and, although they might contend that it was being accumulated for their benefit, their interest in it comes after that of their mother. [Reference was also made to *In re Warren.*[14]]

Sir Lynn Ungoed-Thomas Q.C. and *C. N. Beattie* for the respondent taxpayer. The provision in section 69 (2) that the statutory powers of trustees are subject to the terms of the instrument means that the powers are to be read into the instrument and take effect subject to them. The contrary intention has to be "expressed," but that means merely that it must be found within the terms of the instrument as construed in accordance with the ordinary rules of construction: *In re Rees.*[15] In *In re Turner's Will Trusts*[16] the statutory powers were expressly excluded. In *In re Warren*[17] the decision of the court depended on giving the language of section 69 (2) of the Act of 1925, which was a consolidation Act, the same meaning as the words "unless "expressly forbidden" in section 1 of the Act of 1893.

In the ordinary case of a strict settlement the presumption is that the statutory powers are incorporated. But in this case there is an express provision for accumulation which, as *In re Turner*[18] shows, would be inconsistent with a power of maintenance, and must be contrary to a power of advancement. Apart from authority, it is clear that this settlor cannot have intended that there should be a power to make advances. If an advance was made the capital coming to the reversioner would be reduced. The advance could be brought into hotchpot unless the beneficiary survived the testator. [Reference was made to *In re Fox.*[19]] In this case, therefore, it is not true that everything taken out of the settled fund as the result of advances would be something that the recipient would have eventually received. One has to look at all the circumstances to see what the intention of an instrument is. This was not a settlement where the interest would go from person to person. In such a document provision for maintenance and advancement would be likely, but here the plain object, evidently in the forefront of the settlor's intention, was to build up a fund for the beneficiary after his death on the assumption that he would look after her during his lifetime. That object was to be achieved by the primary trust for accumulation. It was an independent substantive provision and the only other trust was for payment out at the end of the accumulation period to one or more of several probable survivors. The courts have been increasingly reluctant to be bound by artificial rules of construction, and to attempt to ascertain whether a contrary intention is expressed in an instrument by reference to the effect of an advance would be an artificial way of construing the instrument. One has to consider whether, before an advance is made, there is a contrary intention expressed in the instrument.

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[12] [1937] Ch. 15.
[13] [1935] Ch. 533.
[14] [1939] Ch. 684.
[15] [1954] Ch. 202; [1954] 2 W.L.R. 59; [1954] 1 All E.R. 7.
[16] [1937] Ch. 15.
[17] [1939] Ch. 684.
[18] [1937] Ch. 15.
[19] [1904] 1 Ch. 480.

The interest of the beneficiary and her children under clause 2 during the accumulation period is a "prior interest" to the interest of any of them under clause 3 in capital after the death of the settlor. The clauses are independent provisions. Under clause 2 the interest of the children is in having the income accumulated during the period of accumulation. If part of the capital is advanced both will lose their interest to the extent of the advance.

[LORD EVERSHED M.R. But section 32 (1) (*c*) requires that the prior interest has to be in the money which is paid out, which is capital.]

The interest in income involves the interest of seeing that the capital is maintained intact during the period of accumulation. All are interested together in income to the same extent and that interest is given prior to the interest of anyone in capital. *In re Beckett's Settlement*[20] does not touch this case. *In re Spencer*[21] distinguished between an administrative provision for accumulation and a subsequent interest. The inference is that the interests of the children would have been prior interests, as in this case, but for the difficulty of the administrative provision for accumulation. In the case of an express or implied administrative provision, where the purpose is ancillary to the main gift and consequential on it, the substantive volition on the settlor's part is very different. In this case the definite express provision for accumulation of income expressed in the terms of the settlement is a prior interest. [Reference was made to Norton on Deeds, 2nd ed., p. 72, on the test of the "testator's armchair."]

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[20] [1940] Ch. 279.

[21] [1935] Ch. 533.

Bathurst Q.C. in reply. From the tax point of view the settlor's mistake was in marrying the beneficiary. The issue is, as the taxpayer agrees, the construction of the settlement, but the crux is not the meaning of the language used but whether there is an expressed contrary intention to the operation of the statutory powers. It is conceded, applying *In re Turner's Will Trusts*,[22] that a contrary intention can be gleaned by necessary implication and that nothing was said in that case which limited it to section 31. But the ouster of section 32 was not argued and the analogy does not go beyond saying that one must have something in the instrument which makes it an absolutely necessary implication that in no circumstances shall capital be reduced.

The discretionary trust in *In re Beckett's Settlement*[23] was a substantive provision which came before the interest in capital, but there was no difficulty in advances being made in that case. Sums advanced go out of the settlement, which remains unaltered, and it is immaterial whether the provision is substantive or administrative. The "trust fund" in this case is defined to include the main capital fund and also the accumulated capitalised income. There is no doubt that advances can be made from that fund.

Lord Evershed M.R. By a deed of October 16, 1947, the taxpayer transferred to the trustees of the deed the sum of £500 to be held on the trusts therein declared. In that document the taxpayer was thereafter referred to as "the settlor" and I will, therefore, call the document a settlement, though it is, as will appear, of a somewhat unusual nature and also, if I may say so, not in all respects very elegantly drafted. The object of the document was to make provision for a lady, Sagle Norah Thoms, called "the beneficiary." At the time of the document the settlor and the beneficiary were not married but the court has been informed that at some date two or three years thereafter they did become man and wife. The object of the deed manifestly was to make provision upon the settlor's own death for the beneficiary and for any children they might have, whether born in or out of wedlock, and there is, as will appear, a final trust in favour of the beneficiary's sister.

[22] [1937] Ch. 15.

[23] [1940] Ch. 279.

[His Lordship referred to the first four clauses of the settlement, commented that in the case of the beneficiary's sister only there was no requirement that she had to survive the settlor in order to take a vested interest, and went on:] It follows that there is no resulting trust in favour of the settlor. The other clauses are administrative only.

As I have indicated, the settlor and the beneficiary were not at the time married but they did subsequently marry. At some date considerably after the date of the settlement and the marriage, it appears to have occurred to those responsible in the Department of Inland Revenue that here was a case in which, as a result of the application of the provisions of section 32 of the Trustee Act, 1925, a claim for surtax fell to be made upon Mr. Bernstein; and according to the case stated the assessments against which he later appealed were in respect of the four years 1950–51 to 1953–54 inclusive, and those assessments, according to the case (though Mr. Bathurst has said the figures are not to be accepted as correct), amounted to no less than £18,729. On the face of it, the case is a little startling. No advancement pursuant to section 32 of the Trustee Act has ever purported to have been made, and we have been informed by Sir Lynn that at some date, after the claim first arose, by an appropriate instrument, which obviously it would be competent for the parties to execute, the trusts of the settlement have been varied so as henceforth to exclude any possibility of advancement to the beneficiary who is now the wife of the settlor. I do appreciate that those responsible might well take the view that by instruments of this general nature it might be possible for persons of means to provide, as the phrase goes, for a "rolling up" of the income, yet thereafter to make the resultant capital available to a substantial extent by way of advancement to the settlor's wife, and thus to avoid what otherwise might have been a liability to substantial taxes. As it is, the variation which has been made has shown that in this case, at any rate, that is no longer in any circumstances possible.

I must now turn to the relevant sections of the two Acts of Parliament with which we are concerned. The claim is made by virtue of section 405 of the Income Tax Act, 1952. By subsection (1): "If and so long as the settlor has an interest in any "income arising under or property comprised in a settlement"—and I pause to observe that it is not here in doubt that this instrument is "a settlement" within the meaning of this section—"any income so arising during the life of the settlor in any

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"year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of this Act as the income "of the settlor for that year and not as the income of any other "person. . . ." Subsection (2): "For the purpose of subsection (1) ". . . the settlor shall be deemed to have an interest in income "arising under or property comprised in a settlement if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or "applicable for the benefit of the settlor or the wife or husband of "the settlor in any circumstances whatsoever." Anticipating the argument for the Crown, it is this: that by the incorporation into the settlement of the power under section 32 of the Trustee Act, 1925, to make advancements, in this case to the beneficiary, it follows that the settlor must be deemed to have an interest in property comprised in the settlement because property comprised in that settlement may at some time become payable for the benefit of the wife of the settlor in some circumstances, videlicet, upon the exercise of the power of advancement. It will be seen, therefore, that the claim rests on the premise that the provisions of section 32 of the Trustee Act must be treated as available for the trustees of this settlement.

Section 32 is, as I have already indicated, the section which confers upon trustees the power of advancement. I need not read it at length; it is in general terms. Trustees may at any time apply any capital money subject to a trust for the advancement of any person entitled to the capital of the trust property, whether absolutely or contingently. There follows a proviso, paragraph (*a*) of which imposes a limit on the power of advancement in any case of one-half of the presumptive or vested share or interest of the person to whom the advancement is made. Paragraph (*c*) states: "no such . . . application shall be made so as to "prejudice any person entitled to any prior life or other interest, "whether vested or contingent, in the money . . . applied unless "such person is in existence and of full age and consents in "writing to such payment or application." Subsection (2) confines the application of the section to what I may broadly call personalty settlements but no point turns upon that.

Section 32, like its immediate predecessor relating to maintenance and many other sections in the Trustee Act, is in terms general and unqualified. But section 69 (2) of the same Act states: "The powers conferred by this Act on trustees are in "addition to the powers conferred by the instrument, if any, "creating the trust, but those powers, unless otherwise stated, "apply if and so far only as a contrary intention is not expressed "in the instrument, if any, creating the trust, and have effect "subject to the terms of that instrument." I should have stated, as is indeed obvious from the figures that I have mentioned, that the trust property here involved is by no means confined now to the £500 originally paid over to the trustees. Plainly the settlor has from time to time very substantially increased the capital moneys vested in the trustees.

Having read the relevant sections, I may restate the problem in this way. Put in the form of a question, it is whether the power of advancement conferred by section 32 of the Trustee Act applies in this case or whether its application is excluded by the general terms of section 69 (2). A second point arises: if the power of advancement does here apply, then is its effect for practical purposes wholly negatived by the third paragraph of the proviso, seeing that there are not in existence any children of the settlor and the beneficiary, on the ground that such children, if in existence, would have a "prior life or other interest" in the money which might be applied by the exercise of the power? If that paragraph does apply, the circumstances are plainly such that the consent of the non-existent children cannot, of course, be obtained.

When the case was before the special commissioners it was the second point which appealed to them and caused them to reject the Crown's claim to assess the settlor. At that time, in fairness to the commissioners, as Mr. Bathurst pointed out, the Crown's claim had not been limited to any share in the trust property—particularly to the two-thirds share of capital in which the beneficiary has a vested interest liable to be divested on her failing to survive the settlor, now her husband. Subsequently the Crown revised their claim and limited their case to that two-thirds share. In other words, their claim became thenceforth a claim that, by virtue of section 32, there was a power to advance to Mrs. Bernstein up to one-half of that two-thirds. The claim was so limited when the matter came before Danckwerts J., and regarding the interest created by this instrument in that two-thirds, his view was that it could not here be said that these unborn children had a prior interest of any kind in any sums which might be paid out of that two-thirds. He did not, therefore, accept the ground of the commissioners for rejecting the Crown's claim. He did, however, take the view, differing in this respect from the commissioners, that on a true view of this instrument, section 32 must, by the effect of section 69, be treated as excluded. I shall read the passage in his judgment which states that conclusion. The judge had referred to *In re Turner's Will Trusts*,[1] in which the Court of Appeal had to consider the application of the excluding provisions of section 69 (2) in relation not to the powers of advancement given by section 32 but to the maintenance powers given by section 31. I shall make a reference presently to what Sir Mark Romer L.J. in delivering the judgment of this court said in concluding that case. Danckwerts J. in the present case said[2]: " Although that "—that is, *In re Turner*[3]—" was a decision on a different section it " may be applicable in the present case for this reason: from the " way this settlement is drawn, and in particular from the fact " that clause 2 "—that is, the accumulation paragraph—" is an " entirely separate provision from clause 3 "—which states the rights to capital—" and in the plainest possible terms provides for " accumulation during the lifetime of the settlor, it seems to me " that there is an intention that no income shall be distributed " before the death of the settlor. It is true that section 31 deals " directly with income, but this case is very closely allied, for if " the power of advancement be exercised, the effect is to cut off " the appropriate portion of the income after that advancement, " and of necessity the operation must put an end to the trust for " accumulation to that extent. This trust for accumulation is " thus inconsistent with the trust for advancement contained in " section 32 of the Trustee Act, 1925. Section 32, therefore, is " not applicable in the present case and, accordingly, no advances " can be made of either capital or income to the beneficiary " during the settlor's lifetime. That, of course, is the end of " the claim of the Inland Revenue under this particular section, " if it is correct."

Section 69 (2), which I have read, uses the language " so far " only as a contrary intention is not expressed in the instrument " . . . creating the trust," though those words are followed by this later phrase " and have effect subject to the terms of that instrument." At a first reading of the subsection it might seem that in order to exclude the power of advancement there would have to be an express exclusion or something equivalent thereto. But Mr. Bathurst for the Crown has not here contended that the section requires anything so positive in expression. He has conceded (and for reasons which will in a moment appear, I think, if

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[1] [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435, C.A.

[2] [1960] Ch. 444, 453; [1960] 2 W.L.R. 554; [1960] 1 All E.R. 697.

[3] [1937] Ch. 15.

I may say so, rightly conceded) that it suffices to make the statutory power of section 32 inapplicable if, on a fair reading of the instrument in question, one can say that such application would be inconsistent with the purport of the instrument. One ground for taking that view does, I think, clearly emerge from *In re Turner's Will Trusts*,[4] to which I have already alluded. I have said that there the question was whether the powers of section 31 as to maintenance were applicable and not whether section 32 was applicable. At the end of the judgment of the court read by Romer L.J. there is this language[5]: "Another "contention, advanced on behalf of the appellant Jessie Turner, "was that the interest of the persons who should ultimately "become entitled to the residuary estate in the accumulations of "income directed by the will was a prior interest affecting the "property within the meaning of section 31 (1). The question "involved in this contention was adverted to but left undeter"mined by Clauson J. in *In re Spencer*."[6] That is a reference to a point analogous to the second point which arises in this case. Romer L.J. continued[7]: "It is a question of some difficulty "upon which we need not express an opinion. For in view of "the construction that we have put upon section 69 (2) of the "Act, the question can never arise again, inasmuch as the "direction to accumulate is in any case an expression of a con"trary intention within the meaning of that subsection." It follows, therefore, that in *In re Turner's Will Trusts*[8] the Court of Appeal was, as I apprehend the judgment, saying that section 69 (2) will have its exclusive effect if one finds upon a proper reading of the instrument a contrary intention and one need not seek for an express exclusion. As Danckwerts J. observed, this present case obviously bears an analogy, at any rate, to *In re Turner's Will Trusts*,[8] though it involves the problem of excluding a different section. I confess I have felt great difficulty about this case and have been aware of changes of view as the case has been argued. I was much impressed, if I may say so, with Mr. Bathurst's main argument which I can, I hope, adequately summarise thus. He said that when one is dealing with the exclusion of section 31, one is dealing with a section which is primarily directed to an application of income, and that is nonetheless true though section 31 does contain provisions for accumulation. Since an accumulation clause is directed to income, one, therefore, gets at once an obvious conflict between a direction to accumulate income and a power to apply income. But when one comes, says he, to section 32, one is dealing with a power given to deal with capital or what has become capital, and there is, therefore, no such inevitable conflict between a trust to accumulate income and a power to deal with capital, albeit the capital will consist in part of capitalised income. And Mr. Bathurst pointed out with great force, if he will allow me to say so, that to take too easily the view that a trust for accumulation excludes the powers of section 32 might have very far-reaching effects. Take, says he, the ordinary case of a settlement strictly so described, where one gets a life interest to A and then afterwards the capital is payable upon the happening of some event to B or to a class of persons, and where there is a trust for accumulation during some part, for example, of A's life interest. It is, says he, and he says it with force, nothing to the point here that one could not, of course, make advances without A's consent; but in such a settlement there would be nothing inconsistent with the application of income either by way of accumulation (if there was such a provision in the clause) or by paying it to A and in saying you can pay out capital by way of advancement and thus diminish the income of the trust fund which thereafter would be payable to the life-tenant with or without a provision for accumulation at the same time. From that argument Mr. Bathurst says that the view which commended itself to Danckwerts J. would have an effect so wide as almost to exclude the application of the powers in any kind of case.

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[4] [1937] Ch. 15.
[5] Ibid. 28.
[6] [1935] Ch. 533.
[7] [1937] Ch. 15, 28.
[8] [1937] Ch. 15.

I have, as I say, been much impressed with that argument, but in the end of all I have come to the conclusion that the passage which I have read from the judgment of Danckwerts J. ought not in this court to be held to be wrong. It is, after all, a question in every case of examining the instrument and seeing what really was its effect or purpose. In this case it is quite apparent that the whole object of the instrument was to build up a capital sum which would be paid out to the beneficiary or her children, if any, upon the settlor's death. The trust for accumulation has, therefore, in this case a special importance and emphasis. Moreover, that circumstance is, I think, emphasised by the language of the clause to which Mr. Bathurst referred us in Key and Elphinstone (15th ed. (1953), vol. 2, p. 635); for from that precedent this clause does in a material respect slightly differ. I refer to that part of it which states that the resulting investments of income are to go in augmentation of the capital of the trust fund and for the benefit of the person or persons who shall become entitled thereto (that is, to the trust fund); and by definition, taking the two clauses together, it is clear that the trust fund is meant to comprehend whatever from time to time shall be capital in the hands of the trustees. As I have said, there are no other purposes in this instrument save to provide for the event on the settlor's death of distributing a sum of capital to the persons who then become entitled to it. I cannot, I think, in the circumstances improve upon the occasion by trying to add anything to the passage of the judgment of Danckwerts J. which I have read. It seems to me, if I may say so, lucid, it refers to the particular character of this settlement, and on that basis reaches the conclusion which he states and from which, in the end of all, I do not feel that I should dissent.

Taking that view it is unnecessary to pursue the second point raised by Sir Lynn Ungoed-Thomas, the point that the children, though unborn, have here a prior interest in any sums paid out because they are, as he puts it, concerned, or they would be concerned if they lived, to see that the income in each year is, in its totality, applied in augmentation of the capital. I confess that the argument has a refinement and philosophical quality which I am not sure I have entirely been able to appreciate as I should have done. The point is a difficult one and its difficulty is emphasised by the circumstance that in *In re Spencer*[9] Clauson J. adverted to a similar argument. He stated that it would involve grave difficulties at least if it were applicable in a case where accumulation was not specifically directed by the instrument. And as the Court of Appeal said in *In re Turner's Will Trusts*,[10] it is "a question of some difficulty upon which we need "not express an opinion." I am glad to be able to follow that precedent in this case by refraining also from expressing an opinion upon it, save only to say upon this part of the argument I am not to be taken as intimating that I think, as at present advised, that Danckwerts J. was wrong in saying that the point was not one which should decide the case in the respondent's favour. But I put it no higher than that. I rest my conclusion, as did the judge, upon the view that under the rather special circumstances of this case it is not right to say that the power of advancement given by section 32 of the Trustee Act, 1925, ever was available to the trustees, and it follows, accordingly, that

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[9] [1935] Ch. 533.

[10] [1937] Ch. 15, 28, C.A.

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there is no property which might become available in any circumstances to the settlor's wife so as to attract liability for tax upon the settlor.

For these reasons I would dismiss the appeal.

HARMAN L.J. I agree. That the questions agitated before us are of some difficulty is well illustrated by the fact that though the judge reached the same conclusion at the end of the road as the commissioners, he reached it by a precisely opposite route. The commissioners preferred the "prior interest" point; the judge rejected that point and preferred the other.

I need not say anything more about the document, the so-called "settlement," though I should prefer to call it a "trust" rather than a settlement, beyond saying that I take the view, as at present advised, that the interest of "the beneficiary" is not a contingent one but is a vested interest subject to being divested if ever she predeceased the settlor leaving children her surviving or (if she predecease the settlor) whether she had children or not. It is a very inelegantly drawn document, but that seems to be how it works out.

Section 32 of the Trustee Act, 1925, ends by providing that it shall have effect subject to the terms of the instrument. It is said that the way to test the matter is to write section 32 into the instrument, the trust, and then see whether clause 2 supplies a contrary intention. One should also, I take it, read section 32 as being subject to the terms of that instrument, including here clause 2. No doubt if one had an express clause for advancement in this instrument it would be construed as a proviso to operate notwithstanding clause 2, and in some settlements I do not doubt such a clause would be held so to operate. The judge, however, felt that he ought to hold that there was a contrary intention having regard to *In re Turner's Will Trusts*,[11] which my Lord has mentioned.

That case was not concerned with section 32, but with section 31, and it was held by the court, and seems to have been assumed on all sides (there does not appear to have been any argument about it), that if the so-called trust in section 31 (2) should be construed as merely being a power, so as to be reached by section 69 at all, there was a contrary intention which overrode it in the terms of the accumulation clause. That accumulation clause was only a subsidiary part of that settlement. The

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[11] [1937] Ch. 15.

Court of Appeal did so hold, and as a result in the passage which my Lord the Master of the Rolls has read, Romer L.J. concluded that this question could never arise again because the court had assumed that the accumulation clause did provide a contrary intention. It is, accordingly, admitted by the Crown that here the statutory power to maintain included in section 31 of the Act is overridden by the express trust to accumulate, and the Gilbertian position is thus reached that though the children of this union may not be maintained out of income, they may be advanced out of capital.

When one reaches that conclusion it is time to draw the foot back before one slips into the pond of absurdity. The justification is this, that a decision on section 31, which goes to income, does not cover an advancement of capital under section 32. This is true in terms and might, I think, perhaps be justified if the direction to accumulate were merely an ancillary or administrative provision dealing with some contingent event, but here the main object of the settlement is to accumulate income during the settlor's life in order to provide a fund for this lady and his children by her after his death.

I do not think that we should be justified in the suspicion or the possibility suggested by the Crown as being the real object, which is, so they say, to provide the lady during her husband's life, and perhaps him through her, with a sum of money free of surtax and so to be a rich man's device for avoiding surtax. I think that the paramount object of the document, made as it was on a lady who was not his wife, was that which is stated in it, and that being the object, accumulation being in the forefront of the battle, it seems to me to operate as an expressed contrary intention so as to override the statutory power in section 32. If (as the statute enjoins) one reads the statutory power as also subject to clause 2, one cannot allow it to operate. It is said that proves too much, but I do not think in a case of this sort that it is anything more than a matter of construing the document with section 32 added on at the end of it, and seeing whether it is overridden by the trust to accumulate, and I think it is. The judge treated it as a question of income. In that I do not agree with him, for the sum advanced, as counsel for the Crown pointed out, is taken for all purposes out of the settlement, and this income after the advancement cannot be said to be income of the settled property: see *In re Fox*.[12]

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[12] [1904] 1 Ch. 480.

In that proposition I concur. But section 405 of the Income Tax Act, 1952, speaks not only of income, but of "property," which would include capital advanced and so taken out of the settlement. If my view be right it is an end of the case, and an end which is in consonance with the judge's finding. Whether, if I took a different view, I should agree with the judge in his second finding rejecting the so-called "prior interest" point, I do not know. Clauson J. shrank from it in *In re Spencer*,[13] the Court of Appeal did the same in *In re Turner's Will Trusts*,[14] and I think we need not be ashamed to follow those examples. The point, Romer L.J. said, was of some difficulty. Clauson J. thought it of great difficulty. It may be that the answer to it is in the argument submitted in *In re Turner's Will Trusts* [15] and reported in these words: "A difficulty in the way of this contention is, however, that prior interest presumably means an interest which, during the period of accumulation, confers a paramount right to call for the income." Here there is in a sense a prior interest in income in the lady herself and in her children if she has any, but whether that ought to be called a prior interest is a matter, as I say, of doubt, although I myself feel some inclination towards the view of the commissioners upon it. But that is not a matter we need decide; the first point concludes the matter. There is no power of advancement here. The danger which the Crown purports to anticipate cannot, therefore, happen, and the income cannot be treated as the settlor's income.

DONOVAN L.J. The effect of this disposition operating on the initial £500 and the added funds has been to remove a maximum of some £6,000 per annum of the settlor's income from the surtax net: and one can hardly suppose him to have been so unsophisticated as not to foresee and intend that result, whether as a primary object or only a secondary one. If so, it is unlikely that he would want anything in the deed to produce at any time the opposite result. But no evidence was called as to the circumstances surrounding the creation of the trust and one is confined to the document itself when looking for any contrary intention within the meaning of section 69 (2).

The document has a number of distinctive and unusual features. There is no power to apply income for maintenance, no express power to advance capital, no power of appointment or of revocation and no resulting trust. The one reasonable explanation which fits all these omissions is an intention on the part of the settlor that his surtax saving shall be secure. A resulting trust, for example, would have done no harm if estate duty were alone in mind. Accordingly, the document itself raises, to my mind, a presumption that the settlor wanted no power of advancement in it which would substantially reduce his surtax saving the moment he married the beneficiary.

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[13] [1935] Ch. 533.
[14] [1937] Ch. 15.
[15] Ibid.

I do not found my conclusion on these considerations. I agree that a contrary intention is here to be found for the reasons which my brothers have given. But having reached that conclusion, I think that the features of the deed which I have indicated do tend to confirm that it is right. Accordingly, I would also dismiss this appeal.

Appeal dismissed with costs.
Leave to appeal to the House
of Lords refused.

Solicitors: *Solicitor of Inland Revenue; Gouldens.*

E. D.

A. D. WIMBUSH & SON LTD. *v.* FRANMILLS PROPERTIES LTD.

1961
Feb. 14, 15.
Plowman J.

[1959 A. No. 444.]

Landlord and Tenant—Business premises (security of tenure)—Notice of opposition to new tenancy—Notice served by present landlord's predecessor—Grounds of opposition that "the landlord intends to occupy "the premises"—Whether new landlord entitled to rely on notice—Meaning in notice of "landlord"—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 30 (1) (*g*), 44.

By a lease dated July 25, 1938, F. J. M. demised certain shop premises to the applicants for a term of 14 years with an option for a further term of 7 years. The option was duly exercised and by a lease dated December 18, 1951, the applicants were granted a term of 7 years from June 24, 1952. On February 20, 1952, F. J. M. granted a 21-year lease from December 25, 1951, to F. P. Ltd., who thus became the applicants' landlords.

[Reported by Philippa Price, Barrister-at-Law.]

On May 19, 1953, F. P. Ltd. granted an underlease for 13½ years to begin on June 24, 1959, to M. & M. Ltd.

On July 2, 1958, F. P. Ltd. served on the applicants a notice in the following terms: "1. I [F. P. Ltd.] . . . landlord (note 7) of "the above-mentioned premises hereby give you notice terminating "your tenancy on the 30th day of June, 1959. . . . 3. I would "oppose an application to the court under Part II of the Act for "the grant of a new tenancy on the ground that at the termination "of the current tenancy the landlord intends to occupy the holding "for the purposes, or partly for the purposes, of a business to be "carried on by him therein. 4. This notice is given under the "provisions of the Landlord and Tenant Act, 1954. Your attention "is drawn to the notes overleaf." Note 7, on the reverse side of the notice, said: "The term 'landlord' in this notice does not "necessarily mean the landlord to whom the rent is paid; it means "the person who is landlord for the purposes of Part II of the "Act."

On July 3 the applicants gave notice that they were not willing to give up possession on June 30, 1959, and applied to the county court for a new tenancy for a term of 7 years from the expiration of their existing tenancy. On the transfer of the proceedings to the High Court, the application was opposed by M. & M. Ltd., who became landlords on June 24, 1959; F. P. Ltd. having on December 31, 1958, assigned their interest to the second respondents, it was ordered on June 29, 1960, that all further proceedings against them be stayed.

On the hearing of the application the applicants contended that M. & M. Ltd. were not entitled to rely on section 30 (1) (*g*) [1] of the Landlord and Tenant Act, 1954, because they were not the landlords referred to in the notice as intending to occupy the premises for the purposes of their own business. The validity of the notice was not disputed and it was accepted that, if M. & M. Ltd. were entitled to oppose the application on the ground set out in paragraph (*g*), that ground had been made out:—

Held, that the word "landlord" in paragraph 3 of the notice did not necessarily mean the landlord who had served the notice, and the reference in the paragraph to the "landlord" was a reference to the landlord who was entitled to defeat the applicants' claim to a new tenancy by establishing that he intended to occupy the premises for the purposes of his own business, and that could only be the person who was landlord within the meaning of section 44 of the Landlord and Tenant Act, 1954, at the date of the hearing, that being the date at which the question of intention was relevant; and that, provided that the notice given by the landlord under section 25 stated as the ground of opposition to the tenant's application the grounds stated by paragraph (*g*) of section 30 (1), the person who at the date of the hearing was the landlord and who was opposing the application, could properly pray in aid the notice given by a predecessor as landlord. Accordingly, M. & M. Ltd. were entitled to rely on the notice, and the court was precluded by section 31 (1) from granting the applicants a new lease.

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[1] Landlord and Tenant Act, 1954, s. 30 (1): "The grounds on which "a landlord may oppose an application under subsection (1) of section "24 of this Act are such of the "following grounds as may be stated "in the landlord's notice under section 25 of this Act or, as the case "may be, under subsection (6) of "section 26 thereof, that is to say ". . . (*g*) subject as hereinafter provided, that on the termination of "the current tenancy the landlord "intends to occupy the holding for "the purposes, or partly for the purposes, of a business to be carried on "by him therein, or as his residence."

Betty's Cafés Ltd. v. *Phillips Furnishing Stores Ltd.* [1959] A.C. 20; [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607, H.L. and dictum of Parker L.J. in *X. L. Fisheries Ltd.* v. *Leeds Corporation* [1955] 2 Q.B. 636, 640; [1955] 3 W.L.R. 393; [1955] 2 All E.R. 875, C.A. applied.

ADJOURNED SUMMONS.

A. D. Wimbush & Son Ltd., tenants of No. 2, Trinity House, Trinity Street, Coventry, applied to the court under section 24 of the Landlord and Tenant Act, 1954, for a new lease of the premises. The applicants, who had been tenants of the premises since 1938, carried on there the business of confectioners.

By a lease dated July 25, 1938, F. J. Mills demised the premises to the applicants for a term of 14 years, with an option for a further term of 7 years. That option was duly exercised and by a lease dated December 18, 1951, the applicants were granted a term of 7 years from June 24, 1952. On February 20, 1952, F. J. Mills granted a lease of the premises to Franmills Properties Ltd., the first respondents, for a term of 21 years. Thus, at that date, Franmills Properties Ltd. became the landlords of the applicants. On May 19, 1953, Franmills Properties Ltd. granted to Mills & Mills Ltd., the third respondents, an underlease of 13 years and 183 days from June 24, 1959, expiring on December 24, 1972. Thus, from June 24, 1959, down to the date of these proceedings, Mills & Mills Ltd. were the landlords of the applicants.

On July 2, 1958, Franmills Properties Ltd. served on the applicants a notice dated July 1, 1958, under section 25 of the Landlord and Tenant Act, 1954,[2] terminating their tenancy on June 30, 1959. The notice was addressed to the applicants and was in the following terms:

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[2] Landlord and Tenant Act, 1954, s. 25 (6): "A notice under this "section shall not have effect unless "it states whether the landlord would "oppose an application to the court "under this Part of this Act for the "grant of a new tenancy and, if so, "also states on which of the grounds "mentioned in section 30 of this Act "he would do so."

"1. I, Franmills Properties Ltd. . . . landlord (note 7) of the "above-mentioned premises hereby give you notice terminating "your tenancy on the 30th day of June, 1959.

"2. You are required within two months after receiving this "notice to notify me in writing whether or not you will be willing "to give up possession of the premises on that date.

"3. I would oppose an application to the court under Part II "of the Act for the grant of a new tenancy on the ground that "on the termination of the current tenancy the landlord intends "to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein.

"4. This notice is given under the provisions of the Landlord "and Tenant Act, 1954. Your attention is drawn to the notes "overleaf." Among the notes overleaf, note 7 provided: "The "term 'landlord' in this notice does not necessarily mean the "landlord to whom the rent is paid; it means the person who is "the landlord for the purposes of Part II of the Act. . . ."

The notice was accompanied by a letter written by the solicitor to Franmills Properties Ltd. and addressed to the secretary of the applicants. It was headed: "Shop No. 2 Trinity House, Coventry," and was in these terms: "You will recollect that my "clients, Franmills Properties Ltd., were in communication "with you during May, 1957, with regard to the grant of a new "lease of the above property and that they were unable to grant "a new tenancy on the expiry of your lease. As your lease "expires on June 24, 1959, it is necessary for my clients to serve "notice to terminate their tenancy under the Landlord and "Tenant Act, 1954. Accordingly I am enclosing herewith the "statutory notice and shall be much obliged if you will kindly "acknowledge receipt. You will observe that by virtue of paragraph 2 of this notice it is incumbent upon you to notify my "clients within two months whether or not you are willing to give "up possession of the premises on June 30, 1959."

The correspondence in May, 1957, referred to in the first paragraph of the letter, included a letter dated May 14, 1957, from Franmills Properties Ltd. to the applicants stating as follows: "We regret to advise you that the board of this company is "unable to consider the grant of a new lease to you as the "property was let some years ago from a date coinciding with the "end of your lease to another tenant." On July 3, the applicants gave notice that they would not be willing to give up possession on June 30, 1959. On October 6, 1958, they applied to the Coventry County Court, under section 24 of the Act, for a new tenancy and those proceedings were transferred to the High Court. In their application for a new tenancy the applicants proposed a new lease for a term of 7 years from the expiration of their then present lease at a rent of £1,100 per annum and the terms and conditions, apart from rent, contained or incorporated in the existing lease. Although under the Act the court would have had jurisdiction to grant a lease for a term not exceeding 14 years, counsel for the applicants did not seek to resile from what was stated in that application as to the length of term which the court was asked to grant.

The application was opposed by Mills & Mills Ltd., who became the applicants' landlords for the purposes of the Act on June 24, 1959. Franmills Properties Ltd., although they were the applicants' landlords until December 31, 1958, were no longer interested, having on that date assigned their interest to the second respondents, the trustees of Sir Thomas White's Charity. They went into voluntary liquidation early in 1959 and by an order dated June 29, 1960, Pennycuick J. directed that all further proceedings in the matter be stayed against them, except for the purposes of obtaining directions as to their costs.

The second respondents, the trustees of Sir Thomas White's Charity, were not really interested because even if the court ordered a new lease for the 7 years which the applicants asked for, such lease would expire before the lease of Mills & Mills Ltd. fell in.

On the hearing of this application the validity of the notice given by Franmills Properties Ltd. was not in question.

R. E. Megarry Q.C. and *G. A. Grove* for the applicants. There are two issues: first, are the applicants entitled to a new lease, and secondly, if so, what should be the length of the term? As to the first point: the notice was given by Franmills Properties. If they (Franmills Properties) notify the applicants that *they* intend to occupy the premises, Mills & Mills cannot come along and say that *they* intend to occupy. Until the proceedings started the applicants did not know of the existence of Mills & Mills as landlords. At the date the notice was served the time for the commencement of Mills & Mills' term had not started to run. [Sections 24 (1), 25, 29, 30 and 64 of the Landlord and Tenant Act, 1954, were read.] The scheme of the Act is that the grounds on which a landlord may give notice vary considerably; some depend on the tenant's misbehaviour; others are personal to the landlord and concern his intention. The scheme of the Act is that you have a landlord who is to some extent a fluctuating landlord. The words of Jenkins L.J. in *Piper* v. *Muggleton* [3]—" . . . that may preclude any effective opposition " . . ."—may refer, say, to a case where the notice relies on paragraph (*g*) of section 30 (1), and the new landlord wishes to rely on paragraph (*f*). This was the sort of situation the Court of Appeal had in mind, not the situation in the present case, where the question is: Can a landlord rely on what his predecessor has done?

The applicants submit (a) that Mills & Mills cannot rely on Franmills' notice, and (b) on its true construction this is a notice that Franmills intend to occupy, whereas, contrary to what the notice says, the evidence is that Mills & Mills intend to occupy. No one reading the notice could infer an intention to occupy on the part of Mills & Mills. There must be a sufficient reference in the notice to section 30 (1) (*g*) by the landlord who intends to occupy: *Biles* v. *Caesar* [4]; *Betty's Cafés Ltd.* v. *Phillips Furnish-Stores Ltd.* [5] If it is pleaded that landlord A intends to occupy, it is no use proving that landlord B intends to occupy. *Biles* v. *Caesar* [6] was not a case where evidence showed one thing and a party pleaded another; nor does it hold that if a ground is specified, it may be relied upon by persons other than the landlord who gave it.

The notice identifies Franmills with " the landlord." In paragraph 3 of the notice " I " must be Franmills. It does not say " The landlord at the termination of the tenancy " would oppose an application. The object of a notice is to convey information. There are two possibilities: (a) that the proceedings might be called on before June 24, 1959; (b) as the situation is in fact. If it were (a), then the only " landlords " would have been Franmills, and they have admittedly never intended to occupy. Their opposition to a new tenancy must, therefore, have failed; they could not resist the claim by proving that a future landlord (viz., Mills & Mills) will have an intention to occupy. It would be wrong if the result were made to depend on the date on which the hearing happens to take place. If it were (b), then Mills & Mills must rely on a notice which does not support the contention that Mills & Mills intend to occupy.

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[3] [1956] 2 Q.B. 569, 577; [1956] 2 W.L.R. 1093; [1956] 2 All E.R. 249, C.A.

[4] [1957] 1 W.L.R. 156, 157; [1957] 1 All E.R. 151, C.A.

[5] [1959] A.C. 20; [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607, H.L.

[6] [1957] 1 W.L.R. 156.

[PLOWMAN J. A landlord, when he serves a notice, cannot foresee the date when the case will come to court.]

This notice is not one which conveys to the tenant the information which he is entitled to have.

As to the length of term, the applicants have been trading on these premises for 23 years. [Reference was made to *Upsons Ltd.* v. *Robins Ltd.*[7]] Although under the Act there is jurisdiction to grant a lease for a term not exceeding 14 years, the applicants do not wish to resile from the proposal in their application for a term of 7 years.

L. A. Blundell Q.C. and *J. T. Plume* for the respondents. On a proper reading of the notice, one is not compelled to the conclusion that it was Franmills who were going to occupy. The notice refers to note 7. This would put the tenant on inquiry as to who might be landlord "for the time being"; in other words, at the termination of the current tenancy. It should not be overlooked that the notice was accompanied by the letter of July 1, 1958. The only person who could qualify under paragraph 3 of the notice was "another tenant" referred to in the letter of May 14, 1957.

The point is a simple one: all the respondents have to do is establish one of the grounds in section 30 (1). In the *Betty's Cafés* case [8] the House of Lords laid down that the date of hearing is the relevant time for establishing intention. It is not now disputed that Mills & Mills are now landlord or that it has an intention or that that intention falls within section 30 (1) (*g*). By section 31 a landlord must rely on one of the grounds specified. The respondents must also show that it was a ground which was stated in the landlord's notice under section 25. It is not required that the landlord *who served the notice* had any such intention. The notice must, of course, set out the ground which is now relied on, and this is so whether it is the same landlord or whether there has been a change of landlord. In section 30 (1) the phrase "a landlord" envisages that someone who is not the landlord who has served the notice may oppose the application. The only requirement is that the notice should make it clear on which ground reliance will be placed. As to a sufficient reference to the paragraph, see *Biles* v. *Caesar*,[9] *Bolton's (House Furnishers) Ltd.* v. *Oppenheim* [10] and *Betty's*

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[7] [1956] 1 Q.B. 131; [1955] 3 W.L.R. 584; [1955] 3 All E.R. 348, C.A.

[8] [1959] A.C. 20.

[9] [1957] 1 W.L.R. 156.

[10] [1959] 1 W.L.R. 685; [1959] 3 All E.R. 90.

Cafés Ltd. v. *Phillips Furnishing Stores Ltd.*[11] When the notice is served the landlord is looking ahead and must make an intelligent forecast as to what the position will be at the date of the hearing: *Betty's Cafés.*[12] There is no need for the intention to exist at the date of the notice, the function of the notice being to warn the tenant of possible future opposition. All that is necessary is for the notice to reserve a right for the landlord to rely on a particular paragraph.

"The landlord" under section 30 must be the landlord at the date of the trial. The scheme of the Act is that the successor landlord steps into the shoes of his predecessor and is bound by his acts and omissions. The successor inherits the section 25 notice and the grounds set out in it. Part of the ratio decidendi in *X.L. Fisheries Ltd.* v. *Leeds Corporation*[13] is authority for this. See also *Piper* v. *Muggleton.*[14]

To summarise: Mills & Mills are clearly the landlords today and have had passed on to them the ground under paragraph (*g*); they have also satisfied sections 30 and 31 and can rely upon the notice served by their predecessors.

As to the length of term, the court can take into account the length of time that the tenancy has been continued under section 64. [*Upsons Ltd.* v. *Robins Ltd.*[15] was referred to.] The policy of the Act is that a landlord who has had his interest for more than five years is entitled to possession (we are supposing he has failed on a technicality). Accordingly, only a very short tenancy should be granted if the landlord shows an urgent need. It should, in this case, be only a nominal term.

Megarry Q.C. in reply. Under section 24 (1) the court has no power to create a new tenancy retrospectively. The term must start to run from the end of the section 64 period. Continuation at the old rent under section 64 is a benefit that Parliament has given to the tenant. It would be wrong to take this benefit from the tenant or nullify it.

As to the notice, it cannot be said that it matters not how the tenant reads it. The function of any notice is to convey information. Further, the fact of the accompanying letter is irrelevant; the tenant should not have to follow clues. In the cases referred to for the respondents, the notices were challenged on the ground that the reference to the ground was incomplete,

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[11] [1959] A.C. 20, 84.

[12] Ibid. 92–93, 98.

[13] [1955] 2 Q.B. 636; [1955] 3 W.L.R. 393; [1955] 2 All E.R. 875.

[14] [1956] 2 Q.B. 569.

[15] [1956] 1 Q.B. 131.

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whereas here the notice is inaccurate or misleading: *Bolton s (House Furnishers) Ltd.* v. *Oppenheim.*[16] The *X.L. Fisheries* case [17] is distinguishable, the only point there being whether a new landlord could serve a counter-notice. In *Piper* v. *Muggleton* [18] the only issue was whether a person continued to be a landlord or not.

Plowman J. stated the facts and continued: The first question to consider is whether under the Act of 1954 the applicants are entitled to a new lease at all. Section 29 (1) is in these terms: "Subject to the provisions of this Act, on an application under "subsection (1) of section 24 of this Act for a new tenancy the "court shall make an order for the grant of a tenancy comprising "such property, at such rent and on such other terms, as are "hereinafter provided." So, subject to the provisions of the Act, which I take to be a reference to sections 30 and 31, I am bound to order a new tenancy. However, I must refer to sections 30 and 31. Section 31 (1) provides: "If the landlord opposes an "application under subsection (1) of section 24 of this Act on "grounds on which he is entitled to oppose it in accordance with "the last foregoing section and establishes any of those grounds "to the satisfaction of the court, the court shall not make an "order for the grant of a new tenancy." Mr. Blundell submits that I cannot make an order in favour of the applicants because the landlords do oppose on grounds on which they are entitled to do so under section 30 and they have established those grounds.

The relevant part of section 30, paragraph (*g*) of subsection (1), is in these terms: "The grounds on which a landlord may "oppose an application under subsection (1) of section 24 of this "Act are such of the following grounds as may be stated in the "landlord's notice under section 25 of this Act or, as the case "may be, under subsection (6) of section 26 thereof, that is to "say . . . (*g*) subject as hereinafter provided, that on the termina- "tion of the current tenancy the landlord intends to occupy the "holding for the purposes, or partly for the purposes, of a business "to be carried on by him therein, or as his residence."

I am not concerned with the part of the paragraph which states, "subject as hereinafter provided," because that relates to a case where the landlord has owned his interest for less than 5 years, and the present case is not such a case. The relevant part of paragraph (*g*) is in terms which I will read again: "that "on the termination of the current tenancy the landlord intends "to occupy the holding for the purposes . . . of a business to be "carried on by him therein." It is not disputed in the present case that if the landlords, Mills & Mills Ltd., are entitled to oppose the application on that ground, then that ground has in fact been established by evidence, and I am satisfied (as section 31 (1) requires me to be) that if that is a ground on which the landlords can rely, it has been established.

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[16] [1959] 1 W.L.R. 685, 917.

[17] [1955] 2 Q.B. 636.

[18] [1956] 2 Q.B. 569.

The real contest in this case is and has been on the question whether Mills & Mills Ltd., the landlords, are entitled to set up paragraph (*g*) of section 30 (1) at all. Here I must go back to the notice which was given by Franmills Properties Ltd. on July 1, 1958, under section 25 of the Act. It is common ground that they were the applicants' landlords at that time.

[His Lordship read the notice and continued:] Among the notes overleaf is a note, note 7, which states, "The term "'landlord' in this notice does not necessarily mean the landlord to whom the rent is paid," and that note must apply just as much to the occasion in paragraph 3 of the notice where the word "landlord" is used as it does to the occasion in paragraph 1 where attention is specifically drawn to note 7 on the back; that is to say, when in paragraph 3 the giver of the notice says, "I would oppose an application to the court under Part II of the "Act for the grant of a new tenancy on the ground that on "the termination of the current tenancy the landlord intends to "occupy," note 7 sounds a cautionary note in pointing out that the word "landlord" in that context does not necessarily mean the landlord to whom the applicants are at that moment paying the rent. Mr. Blundell also points out that if the word "landlord" were being used in paragraph 3 in a sense which confined it exclusively to Franmills Properties Ltd., one would have expected not to find the word "landlord" there at all, but to have found repetition of the word "I" with which the paragraph commenced. Mr. Megarry points out that the landlord giving the notice was Franmills Properties Ltd. He submits that, on its fair construction, the notice means that Franmills Properties Ltd. intended to occupy the holding for the purposes of a business to be carried on by it and that it cannot really refer to Mills & Mills Ltd., of whom, in fact, at that date the applicants had never heard as landlords. They knew of their existence, because they were carrying on business in adjoining premises, but I think that it is fair to say that they had never at this time heard of Mills &

Mills Ltd. as landlords. Mr. Megarry submits that in those circumstances Mills & Mills Ltd. are not entitled to rely on this notice for the purposes of section 30 of the Act.

[His Lordship read the letter from the solicitor to Franmills Properties Ltd. to the applicants, that accompanied the notice and said:] The correspondence in May, 1957, in fact included a letter dated May 14, 1957, written by Franmills Properties Ltd. to the applicants and stating in the second paragraph: " We " regret to advise you that the board of this company is unable " to consider the grant of a new lease to you as the property was " let some years ago from a date coinciding with the end of your " lease to another tenant." Mr. Blundell says that by following this trail the applicants could have deduced that the landlord referred to in paragraph 3 of the notice which I have read was someone other than Franmills Properties Ltd. I think it obviously would have been much better if the letter accompanying that notice had stated plainly that the landlord referred to in paragraph 3 of the notice was not in fact intended to be Franmills Properties Ltd. at all but was Mills & Mills Ltd. It would have been quite easy to have done that, and it would have saved a lot of trouble, but I cannot agree that the word " landlord " in paragraph 3 of that notice necessarily means Franmills Properties Ltd. at all. In my judgment, the reference in that paragraph to the landlord must be taken to be a reference to the landlord who is entitled to defeat the applicants' claim to a new tenancy by establishing that he intends to occupy the premises for the purposes of his own business, and that can only be the person who is landlord within the definition in section 44 of the Act at the date of the hearing, because that is the date at which the question of the intention is relevant, as was established by the decision of the House of Lords in *Betty's Cafés Ltd.* v. *Phillips Furnishing Stores Ltd.*[1] As I say, I think that the fair construction of this paragraph, in the light of the Act, is that it refers to the landlord who will be taking this point at the relevant time in opposition to the applicants' claim for a new lease.

However, Mr. Blundell went further than that. He said that even if Mr. Megarry is right on the question of construction—i.e., that the reference to " the landlord " in paragraph 3 of the notice is in truth a reference to Franmills Properties Ltd.—it does not matter. What Mr. Blundell says, as I understand it, is this. Mills & Mills Ltd. are admittedly the landlords today; it is not in dispute that they intend to occupy these premises for the purposes of their own business; such an intention falls within paragraph (*g*) of section 30 (1) of the Act, and the ground which is specified in that paragraph is in fact the ground which is specified in the landlords' notice under section 25; therefore, section 31 (1) of the Act applies and I am precluded from making any order in favour of the applicants. He submits that section 30 does not require that the landlord who served the notice should have any such intention as is referred to in paragraph (*g*): what is required is that the landlord opposing the application should have the relevant intention, and it is sufficient that the notice given under section 25 should contain a sufficient reference to paragraph (*g*). I accept this argument.

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[1] [1959] A.C. 20; [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607, H.L.

I was referred to certain cases on what is meant by a sufficient reference to paragraph (*g*): *Biles* v. *Caesar* [2] and *Bolton's* (*House Furnishers*) *Ltd.* v. *Oppenheim*,[3] to which I do not think I need refer, because if the question is (and in my view it is): Does this notice refer sufficiently to paragraph (*g*) as being the ground on which the landlord who opposes the application will oppose it, it seems to me that the answer to that is clearly " Yes," particularly as paragraph (*g*) is in terms set out in the notes at the back of the form, and what is stated on the front follows the form of the note on the back.

X.L. Fisheries Ltd. v. *Leeds Corporation*,[4] referred to by Mr. Blundell, in my judgment supports the view which I have taken. It is perfectly true, as Mr. Megarry pointed out, that the question which arose in that case is not precisely the same as the question in the present case. The question there was not whether, if I may put it in this way, landlord No. 2 could take advantage of a section 25 notice served by landlord No. 1, but whether landlord No. 2 could serve his own notice, landlord No. 1 not having served a notice at all. But Parker L.J., in an interlocutory observation during legal argument, said [5]: " If the landlord sets the machinery " in motion by giving notice under section 25 (6), he has to " anticipate the grounds on which he will rely in objecting to an " application, and if there is after that a change of landlord " within the two months' period, the new landlord will merely " inherit the grounds stated by his predecessor in title, since no " provision is made for amendment."

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[2] [1957] 1 W.L.R. 156; [1957] 1 All E.R. 151, C.A.

[3] [1959] 1 W.L.R. 685, 913, C.A.; [1959] 3 All E.R. 90.

[4] [1955] 2 Q.B. 636; [1955] 3 W.L.R. 393; [1955] 2 All E.R. 875.

[5] [1955] 2 Q.B. 636, 640.

Mr. Megarry, quite rightly, drew attention to the fact that that is an interlocutory observation, but he also very fairly calls attention to the fact that it was an interlocutory observation which had the approval of the Court of Appeal in *Piper* v. *Muggleton*.[6] Jenkins L.J., who delivered the judgment of the court, said[7]: "The incoming 'landlord' must, we think, be bound by the acts "or omissions of his predecessor while answering that description (see *per* Parker L.J. in the case just cited), [*X.L. Fisheries* "v. *Leeds Corporation*] and that may well preclude any effective opposition on his part, save as regards the terms of the new "tenancy." Since the observation of Parker L.J. to which I have referred is the only observation falling from him which is reported in the *X.L. Fisheries* case,[8] it follows that the approval which Jenkins L.J. was giving to the observation of Parker L.J. must have been to this observation which I have read.

Evershed M.R., after referring to section 30 (1) and paragraph (*f*) of that subsection, said this[9]: "The question is whether "those sections contemplate or require that the landlord, through"out the whole period after the machinery of the Act has been "set in motion, should be the same person, whether an individual "person or a persona ficta. I think that the answer to that ques"tion is inevitably in the negative. I can find nothing in the "sections or the language used therein which would require the "continuity throughout of the same person as landlord; and, "indeed, it would be a strange thing if the Act did so require, "because, though Parliament may do many things, it cannot "insist that a particular person shall live a particular length of "time. It is, in other words, I think quite plain that when the "landlord comes to put in his notice of opposition, it is sufficient "if at the time he puts it in he is in fact the landlord. It is, "therefore, sufficient if he, having acquired the premises or the "reversion since the date of the request, is able to say when he "puts in his notice of opposition before the two months' period "expires that he is the landlord and (to take the example that I "chose from section 30) that on the termination of the current "tenancy he intends to reconstruct."

In my judgment, first, this notice, fairly construed, means that it is the person who will be opposing the tenant's application for a new lease who will oppose on the ground set out in paragraph (*g*) of section 30 (1) of the Act; secondly, Mr. Blundell is right in submitting that in any case, provided the notice which the landlord gives under section 25 states as the ground of opposition which is to be made to the tenant's application the grounds stated under paragraph (*g*), then the person who at the date of the hearing is the landlord, and who is opposing the application, can properly pray in aid the notice which has been given by a predecessor as landlord. It follows from that that I am precluded (whatever I might otherwise have done) by section 31 (1) from granting the applicant a new lease. I have, however, been asked to go on to consider the question of what length of term I should have granted them if I had been bound to grant them a new lease, and I have been asked to do this in case my decision on the earlier point should be held to be wrong. Taking into account all the circumstances of this case, as I am bound to do under section 33 of the Act—the circumstances which are set out in the evidence, the submissions which have been made by Mr. Megarry and Mr. Blundell, the cases to which I have been referred, such as *Upsons Ltd.* v. *Robins Ltd.*,[10] the observations of Lord Morton in the *Betty's Cafés* case,[11] and the decision of Wynn-Parry J. in *In re No. 88, High Road, Kilburn* [12]—I should have granted the applicants a tenancy starting with the end of the current tenancy and expiring on June 24, 1962, that is to say, three years after the end of the 7-year term granted to them by the second of their two leases.

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[6] [1956] 2 Q.B. 569; [1956] 2 W.L.R. 1093; [1956] 2 All E.R. 249, C.A.

[7] [1956] 2 Q.B. 569, 578; [1956] 2 W.L.R. 1093.

[8] [1955] 2 Q.B. 636.

[9] Ibid. 646.

Application dismissed. Costs.

Solicitors: *Stafford Clark & Co. for Oakley & Co., Birmingham; Sharpe, Pritchard & Co. for Newsome & Co., Coventry.*

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[10] [1956] 1 Q.B. 131; [1955] 3 W.L.R. 584; [1955] 3 All E.R. 348, C.A.

[11] [1959] A.C. 20.

[12] [1959] 1 W.L.R. 279; [1959] 1 All E.R. 527.

DUNN *v.* BLACKDOWN PROPERTIES LTD.

1961
Feb. 21;
Mar. 3.

Cross J.

[1959 D. No. 1243.]

Easement—Sewage and drainage—Right arising at uncertain date in future—Right to use sewers and drains "now passing or hereafter "to pass" under private road—No sewers and drains in existence at date of grant—Whether void for perpetuity—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 162 (1) (*d*) (iv).

Perpetuity Rule—Easement—Right to use sewers and drains "hereafter "to pass"—Whether void.

By two conveyances dated respectively December 17, 1926, and January 11, 1938, two plots of land were conveyed to the plaintiff's predecessors in title, together with the right for the grantees, their heirs and assigns to use the sewers and drains "now passing or "hereafter to pass" under a private road on which the plots abutted and belonging to the defendants' predecessors in title. At some date after January 11, 1938, the defendants' predecessors in title constructed a surface water sewer along the road and a soil sewer which passed from their land lying north of the road, ran under the road for some distance and turned on to other land of theirs.

In an action by the plaintiff, to whom the two plots together with the foregoing right had been conveyed on September 20, 1945, claiming, inter alia, a declaration that she was entitled to the right to use the sewers and drains then passing or thereafter to pass under the road in connection with the two plots:—

Held, (1) that since no sewers or drains were in existence at the date of the conveyance to the plaintiff's predecessors in title the grant of the right to use the sewers and drains "hereafter to pass" was a grant of an easement to arise at an uncertain date in the future not limited to take effect within the perpetuity period and was, therefore, void.

South Eastern Railway Co. v. *Associated Portland Cement Manufacturers* (*1900*) *Ltd.* [1910] 1 Ch. 12; 26 T.L.R. 61, C.A. and *Sharpe* v. *Durrant* [1911] W.N. 158, C.A. considered.

(2) *Semble,* that, on its true construction, section 162 (1) (*d*) (iv) of the Law of Property Act, 1925,[1] was only intended to make it clear that if a basic right of sewage was not itself void for perpetuity, an ancillary right to construct works to make the basic

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[1] Law of Property Act, 1925, s. 162 (1): "For removing doubts, "it is hereby declared that the rule "of law relating to perpetuities does "not apply and shall be deemed "never to have applied— . . . (*d*) To "any grant, exception, or reservation "of any right of entry on, or user of, "the surface of land or of any "easements, rights, or privileges over "or under land for the purpose "of— . . . (iv) constructing, laying "down, altering, repairing, renewing, "cleansing, and maintaining sewers, "watercourses, cesspools, gutters, "drains, water-pipes, gas-pipes, "electric wires or cables or other like "works."

right effective was not to be treated as void for perpetuity because it might be exercised outside the perpetuity period, but that in any event the plaintiff's claim to use the defendants' sewer was not validated by the subsection.

Held, further, that the words "passing . . . under" in the grant should not be construed as "exclusively passing" under, so that, if the soil sewer had been in existence at the date of the conveyance to the plaintiff, and had passed exclusively under the defendants' land, the plaintiff, provided that she did not propose to overload it, would have been entitled to join up with it and use it, even though it passed under land of the defendants other than the road.

Action.

The following statement of facts is taken substantially from the judgment of Cross J. The plaintiff, Patience Louise Dunn, was the owner of two plots of land, the "pink land" and the "blue land" at Pyrford, between Woking and Byfleet. Both plots had a frontage on the west to a private road, Pine Tree Hill, which belonged to the defendant company, Blackdown Properties Ltd. After running southwards past the pink land and then past the blue land, Pine Tree Hill joined another private road, Norfolk Farm Road, which ran eastwards from the point of its junction with Pine Tree Hill, along the southern frontage of the blue land into a public road, the Old Woking Road.

The conveyances of the pink land and the blue land to the plaintiff's predecessors in title contained certain rights over Pine Tree Hill and Norfolk Farm Road to which the plaintiff was entitled. By a conveyance dated December 17, 1926, the freehold in the pink land was conveyed by John Sugden as beneficial owner to Charles Freemantle together with the full right and liberty for him, his heirs and assigns and all persons authorised by him or them in common with others having the like right and liberty at all times thereafter by day or by night and for all purposes with or without horses or other animals, carts, carriages, wagons or other vehicles to go, return, pass and repass along, over and upon roads coloured brown on the plan to the conveyance, and also full right and liberty for him and such persons as aforesaid, in common with others having the like right and liberty, to use the sewers and drains then passing or thereafter to pass under the said roads or any part thereof. The roads coloured brown on the plan to that conveyance were: (a) the part of Pine Tree Hill which abutted on the pink land; (b) a further part of Pine Tree Hill running southwards past the blue land to Norfolk Farm Road;

and (c) the part of Norfolk Farm Road which ran eastwards from the junction with Pine Tree Hill to the Old Woking Road.

By a conveyance made on January 11, 1938, William Maides and Charles Taylor, as beneficial owners, conveyed to Eric Downes the freehold in the blue land together with full right and liberty for him and his successors in title and all persons authorised by him at all times thereafter by day or by night and for all purposes with or without horses or other animals, carts, carriages, wagons or other vehicles to go, return, pass and repass over and along so much of Norfolk Farm Road and Pine Tree Hill as were coloured brown on the plan, together with full right and liberty for him and such persons as aforesaid in common with others having the like right and liberty to use the sewers and drains then passing or thereafter to pass under the roads or any part thereof. The roads coloured brown on the plan to that conveyance were: (a) the part of Pine Tree Hill running past the blue land, and (b) the part of Norfolk Farm Road running eastwards from its junction with Pine Tree Hill to the Old Woking Road.

Neither on December 17, 1926, nor on January 11, 1938, were there any sewers or drains passing under Pine Tree Hill or Norfolk Farm Road, or any part of those roads through which the respective vendors had the right to discharge drainage.

By a conveyance dated September 20, 1945, both the pink and the blue plots were conveyed to the plaintiff in fee simple together with the foregoing rights. The freehold ownership of the soil of Pine Tree Hill was vested in the defendants by a transfer dated November 14, 1957. The defendants had constructed a surface water sewer along Pine Tree Hill, and a soil sewer which passed from the defendants' land lying immediately to the north of the pink land, ran southwards along Pine Tree Hill for some distance past part of the pink land, and then turned westwards on to other land of the defendants lying on the farther side of the road. From that point it ran downhill to join a sewer in another road considerably farther to the west.

In this action the plaintiff claimed a declaration that she was entitled to a right of way from the pink and blue land over and along that part of Pine Tree Hill on which the land abutted, an injunction restraining the defendants from interfering with that right and a declaration that she was entitled to the right for herself and her successors in title and all persons authorised by her or them (in common with others having the like right) to use the sewers and drains then passing or thereafter to pass under Pine Tree Hill in connection with the pink and blue land. The parties agreed that the plaintiff was entitled to such access from the pink and blue land to Pine Tree Hill as was reasonable having regard to the state of her property from time to time and that the present access was reasonable.

Sir Lynn Ungoed-Thomas Q.C. and *F. Bower Alcock* for the plaintiff. The easement of drainage claimed by the plaintiff is an immediate, vested interest and it is therefore not affected by the rule against perpetuities; the rule is not concerned with the fact that user may take place outside the perpetuity period. The case is covered by the judgment of Swinfen Eady J. in *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers (1900) Ltd.*,[2] where the reservation of the right to have a tunnel constructed which would only arise in the event of a railway being built was held not bad for perpetuity; no doubt has ever been cast on this decision. *Sharpe* v. *Durrant*[3] is distinguishable, for there Warrington J.[4] held that there was no existing right, while in this case the plaintiff has a present right to use sewers and drains "hereafter to pass." [Reference was also made to *Smith* v. *Colbourne*,[5] Gray on Perpetuities, 4th ed. (1942), ss. 279–282, 314–316, Lewis's A Practical Treatise on the Law of Perpetuities (1843), pp. 619–620, and Gale on Easements, 13th ed. (1959), pp. 44 et seq.]

It has long been well-established conveyancing practice to grant easements in respect of sewers which might later come into existence. [Reference was also made to Davidson's Precedents in Conveyancing, 20th ed., p. 152, Prideaux's Forms and Precedents in Conveyancing, 25th ed. (1959), vol. 1, pp. 702, 707, Key & Elphinstone's Precedents in Conveyancing, 15th ed. (1953), p. 590, and Rose & Bowles on Conveyancing Precedents under the Property Statutes of 1925, 4th ed. (1951), p. 114.]

Even if the grants were void at common law they were saved by section 162 (1) (*d*) (iv) of the Law of Property Act, 1925. The section was passed for the removal of doubt and it was manifestly the policy of the section to abolish the rule against perpetuities in connection with sewers. The words "easements ". . . for the purpose of . . . constructing . . . sewers" naturally include rights of drainage so that the plaintiff is entitled to join the sewers already constructed on the defendants' land. It

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[2] [1910] 1 Ch. 12; 26 T.L.R. 61, C.A.

[3] [1911] W.N. 158, C.A.

[4] (1911) 55 S.J. 423.

[5] [1914] 2 Ch. 533, C.A.

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therefore does not matter that words such as "use" and "connecting with another watercourse" are omitted from sub-paragraph (iv).

The words in the grants "passing . . . under" should not be construed as "exclusively passing . . . under" the roads named in the grants; the plaintiff is entitled to join the sewer even though it passes under other land of the defendants.

Nigel Warren Q.C. and *A. J. Balcombe* for the defendant company. The easements of drainage were granted in futuro and are thus bad for perpetuity: *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers (1900) Ltd.*[6] No question of an easement can arise until there is a pipe in existence and the plaintiff has no immediate right to make the defendants lay a pipe to which she can connect one. The statement of the law in Morris & Leach on The Rule Against Perpetuities (1956), at pp. 221 et seq., is accepted. Reliance is placed on the judgment of Warrington J. in *Sharpe* v. *Durrant.*[7] Moreover, practical difficulties might arise in joining onto a pipe laid by another.

Section 162 of the Act of 1925 is retrospective and must be strictly construed. The omission of words such as "use" and "connecting with another watercourse" is noteworthy; on a strict construction it is difficult to add "use" and impossible to add the latter words.

Sir Lynn Ungoed-Thomas Q.C. replied.

Cur. adv. vult.

March 3. CROSS J. read the following judgment which, after stating the facts, continued: The pleadings raised two issues between the parties. The first is as to the measure of access to Pine Tree Hill to which the plaintiff is entitled, and the second is as to her rights of drainage, but when the case was opened it appeared that there was really no dispute between the parties on the first point. Counsel on both sides agreed that the plaintiff was entitled to such access from the pink and blue land to Pine Tree Hill as was reasonable, having regard to the state of her property from time to time, and that the access at present available, which is through two gateways marked on an agreed plan, is reasonable as things are at present.

The facts with regard to the drainage are as follows: [His Lordship stated those facts and continued:] The plaintiff does not at present need any drainage facilities over Pine Tree Hill, but

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[6] [1910] 1 Ch. 12.

[7] 55 S.J. 423.

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she claims that she has the right to connect the drains from any houses which she may hereafter build on the pink or blue land with any sewers belonging to the defendants or their successors in title which may then be in Pine Tree Hill, and in particular with the soil sewer.

In answer to that claim the defendants pleaded: (1) that in so far as the conveyances dated December 17, 1926, and January 11, 1938, purported to grant to the predecessors in title of the plaintiff the right to use sewers and drains thereafter to pass under the roads therein mentioned as opposed to rights to use any sewers and drains then in existence, the respective grants were void as infringing the rule against perpetuities, and, alternatively (2) that the plaintiff is not entitled to use any part of the sewers or drains under the said roads if by doing so she will thereby necessarily use the sewers and drains passing under other parts of the defendants' land in respect of which the plaintiff has no right of drainage. The defendants, that is to say, contend that, if the grants are not void for perpetuity, the only sewer through which the plaintiff would be entitled to pass her sewage would be one running along Pine Tree Hill to the junction of Norfolk Farm Road and then down Norfolk Farm Road into a public sewer in the Old Woking Road. She would, they say, have no right to use a sewer such as the soil sewer, which leaves Pine Tree Hill and passes over other land of the defendants on its way to a public sewer.

Subject to the operation of section 162 of the Law of Property Act, 1925, with which I shall deal later, there is no doubt that the rule against perpetuities applies to grants of easements. It follows that, where the grant is not immediate but is of an easement to arise in the future, it will be void unless it is limited to take effect only within the perpetuity period.

It is not, however, always easy to decide whether the grant in question is of an immediate right or of a right to arise in the future. The difficulty may be illustrated by comparing *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers (1900) Ltd.*[1] with *Sharpe* v. *Durrant.*[2]

The facts in the former case were that, by a conveyance made on December 31, 1847, one John Hales Calcraft conveyed to the South Eastern Railway Co. a strip of land to be used by them as a railway line, reserving to himself, his heirs, appointees and assigns, inter alia, the right to construct at his or their expense a tunnel or archway under the proposed railway where it passed or was intended to pass through or over the land thereby conveyed. In 1907 the defendants, who were assignees of the benefit of this reservation, wished to construct a tunnel under the railway line, but the railway company claimed, among other things, that the reservation was void for uncertainty and for perpetuity.

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[1] [1910] 1 Ch. 12; 26 T.L.R. 61, C.A.

[2] [1911] W.N. 158, C.A.

Swinfen Eady J. held[3] that the reservation was not void for uncertainty, since it was for the vendor, Calcraft, or his assigns to decide where the tunnel was to be built when he or they wished to build it. He dealt with the objection of perpetuity in two ways. First, he held that the right reserved was an immediate easement and not an easement to arise in the future whenever the vendor, Calcraft, or his assigns decided to build the tunnel. Secondly, he pointed out that, as the plaintiff railway company was one of the original contracting parties, the agreement could be enforced against it by the assignee of the benefit of it without regard to the rule against perpetuities. The case went to the Court of Appeal,[4] which affirmed the judgment on this latter ground without expressing any view on the question whether the reservation was of an immediate or a future easement.

The facts in *Sharpe* v. *Durrant*[5] were that in 1889 a vendor conveyed to a purchaser a strip of land for a tramway, reserving the right to cross the line at two points to be selected by him, and the purchaser covenanted to provide crossings at those points. In 1892 the vendor selected one crossing point and notified his selection to the purchaser, but no crossing was made. The purchaser subsequently sold the strip to the defendant.

Warrington J. held[6] that the reservation was void for perpetuity on the ground that, until the selection was made, no easement was created. He went on, however, to hold that the covenant to provide crossings implied a negative undertaking not to interfere with the crossing which bound the land in the hands of the defendant under the doctrine of *Tulk* v. *Moxhay*.[7] *Sharpe* v. *Durrant* was affirmed by the Court of Appeal,[8] but there is no report showing whether or not that court accepted the view of Warrington J. that the reservation was void for perpetuity.

[3] [1910] 1 Ch. 12.

[4] Ibid.

[5] [1911] W.N. 158.

[6] (1911) 55 S.J. 423.

[7] (1848) 1 H. & Tw. 105.

[8] [1911] W.N. 158.

I do not find the views expressed by Swinfen Eady J. and Warrington J. as to the effect from the point of view of perpetuity, of a right given to the grantee to select the site of an easement at all easy to reconcile. I do not think, however, that I am compelled to choose between them in this case. If there had been a sewer under Pine Tree Hill at the dates of the grants to her predecessors in title the plaintiff could have claimed, on authority of the *Associated Portland Cement* case,[9] that the owners of the pink and blue land had from the first a right exercisable at any time to make connections with and use that sewer or any sewer substituted for it, but, as there was no sewer under the road, the plaintiff must rely on the words " or hereafter " to pass." It is not for the owners of the pink or blue land to decide whether or not a sewer will or will not pass under the road in future. That is for the owners of the road to decide, and I do not see how this part of the right granted can be treated as anything but the grant of an easement to arise at an uncertain date in the future.

Counsel for the plaintiff submitted that in the *Associated Portland Cement Company* case [9] the right to construct the tunnel only arose if the railway company decided to build the railway and that Swinfen Eady J. must have thought that this fact did not make the reservation bad for perpetuity. I do not so read the facts or the judgment. It is to my mind reasonably clear that the reservation in question was of an immediate right to build a tunnel exercisable as from the date of the conveyance to the railway company, whether or not a railway was built.

The plaintiff next argued that, assuming that the grants would have been void at common law, they were saved by section 162 (1) of the Law of Property Act, 1925. That subsection starts with the words: " For removing doubts, it is hereby declared that the rule of law relating to perpetuities does " not apply and shall be deemed never to have applied," and there follow three paragraphs, (*a*), (*b*) and (*c*), which deal with rights, powers or rent charges given by way of indemnity against payment of a rent. Paragraph (*d*), which is the material paragraph for present purposes, is in the following terms: " (*d*) To " any grant, exception, or reservation of any right of entry on, " or user of, the surface of land or of any easements, rights, or " privileges over or under land for the purpose of—(i) winning, " working, inspecting, measuring, converting, manufacturing,

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[9] [1910] 1 Ch. 12.

"carrying away, and disposing of mines and minerals; (ii) "inspecting, grubbing up, felling and carrying away timber and "other trees, and the tops and lops thereof; (iii) executing "repairs, alterations, or additions to any adjoining land, or the "buildings and erections thereon; (iv) constructing, laying down, "altering, repairing, renewing, cleansing, and maintaining sewers, "watercourses, cesspools, gutters, drains, water-pipes, gas-pipes, "electric wires or cables or other like works."

It is to be observed that sub-paragraphs (i) and (ii) merely deal with rights of entry or easements which are ancillary to grants of other property. They presuppose grants of minerals or timber which are not themselves void for perpetuity and are directed to making it clear that the fact that the rights of entry or easements given to enable the grantee to get the minerals or timber may not be exercised for many years after the original grants is not to make the ancillary rights void for perpetuity. Similarly, sub-paragraph (iii) presupposes that the grantee has an interest in the adjoining land which is itself not void for perpetuity. He is given a right of entry or easement over the servient land for the purpose of doing the work referred to on this adjoining land, and the fact that these rights may be exercisable from time to time in the indefinite future is not to be treated as making the grant of them void for perpetuity.

Having regard to the context in which it appears, I doubt very much whether sub-paragraph (iv) was intended to do more than make it clear that, if A had a right of drainage or some similar right over the land of B itself which was not itself void for perpetuity, ancillary rights of constructing and repairing works to make the basic right effective were not to be treated as void for perpetuity because they might be exercised outside the perpetuity period. To construe sub-paragraph (iv) as validating grants of rights of drainage or similar rights to arise at some uncertain date in the future would lead to very odd results. Suppose, for example, a grant to landowner A that, if at any time landowner B or his successors in title should construct a road from point X on the border of A's land to point Y on the other side of B's land, A and his successors in title should be entitled to use the road and to construct and use a drain from their land running under it, then if sub-paragraph (iv) means what the plaintiff says it means the grant of the right of drainage would be good although the grant of the right of way was bad.

The plaintiff, however, urges that, whatever the draftsman of the Act may have meant, the words "easements . . . for the "purpose of . . . constructing . . . sewers" naturally include the grant of a right of drainage, and I am prepared to assume for the purpose of this judgment that this is so. Even on that footing, however, I cannot see how the plaintiff can succeed. She is not simply claiming a right to construct and use a drain running under Pine Tree Hill. She is claiming a right to construct a drain from her land to join a sewer already constructed by the owners of the soil of Pine Tree Hill and to use that sewer. I cannot see how the right to use this sewer, if void for perpetuity apart from section 162, can be validated by the section.

Counsel for the plaintiff urged that the only right which his client needed to claim was a right to construct a drain to join the defendants' sewer. She would not, he said, be concerned with what happened to her sewage after it reached the sewer. I cannot accept this submission. The right to construct a drain to join the sewer would be useless to the plaintiff without the further right to use the sewer.

Having regard to the view which I have formed on the perpetuity point, it is not strictly necessary for me to say anything on the other point, but, in case the case goes further, it is perhaps right that I should deal with it. In the ordinary case which the forms in the books of precedents have in mind one has a row of houses adjoining a street and a sewer running under the whole length of the street. The words used there are not designed to meet a case such as the present where, having regard to the lie of the land, the sewer turns away from the street and runs across country under adjoining land of the servient owner. The question is whether in these circumstances the words in the grant "passing ". . . under" should be construed as "exclusively passing "under." On the whole I think not. In cases of doubt a grant should be construed against the grantor and I see no sufficient reason why, had the soil sewer been in existence at the date of the grant, the plaintiff should not have been entitled to join up with it and use it, even though it pass in part under land of the defendant company other than Pine Tree Hill. I would add that in saying this I assume: (a) that the sewer in question passed exclusively under the land of the defendant company on its way to the public sewer and not also over the land of a third party; and (b) that the plaintiff did not propose to put a quantity of sewage into the sewer which was greater than it could reasonably bear having regard to its other commitments at the time. I say nothing about what the position would be if these assumptions were not correct.

In the result I hold that the action fails on this question.

Judgment for the defendants. Costs incurred by plaintiff between September 24, 1959, *and October* 1, 1959, *to be paid by defendants; plaintiff to pay defendants' costs from October* 1, 1959.

Solicitors: *Griffinhoofe & Co.; Herbert Baron & Co.*

M. G. T.

In re FOOTMAN BOWER & CO. LTD.

[No. 00192 of 1959.]

1961
Mar. 6, 16.

Buckley J.

Debt—Discharge—Clayton's case (rule in)—Current account—Effect on nature of debt.

Limitation of Action — Acknowledgment — Current account — Rule in Clayton's case—Payment generally on account—Whether payment "in respect of" balance due—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 23 (4).

By section 23 (4) of the Limitation Act, 1939, "Where any right "of action has accrued to recover any debt . . . and the person liable "or accountable therefor acknowledges the claim or makes any "payment in respect thereof, the right shall be deemed to have "accrued on and not before the date of the acknowledgment or the "last payment."

The applicant supplied a company with goods over a number of years, the account between them being kept as a current account. The company from time to time made payments in the sum of £50 or multiples of £50 on account generally. A receiver and manager of the company's business was appointed in August, 1953. At that date the company owed the applicant a balance of £595 9s. 10d. After his appointment, the receiver made payments of the precise amount owing for the goods supplied to him. On March 23, 1959, an order was made for the compulsory liquidation of the company. The amount owing to the applicant by the company on March 23, 1953, six years before the winding-up order, was £815 7s. 1d. During the period between March 23, 1953, and the date of the appointment of the receiver, the applicant supplied to the company goods of the value of £80 2s. 9d. and the company made six payments to the applicant of £50 each, the last payment being made on July 10, 1953. The applicant lodged a proof in the liquidation of the company for a sum of £595 9s. 10d. The liquidator admitted the proof in the sum of £80 2s. 9d. and rejected the balance of £515 7s. 1d. on the ground that it was statute-barred. On an application for an order reversing the liquidator's rejection of the balance of the debt:—

Held, (1) that the rule in *Clayton's* case (1816) 1 Mer. 572 applied to all current accounts and that, therefore, in accordance with that rule, the various credits were prima facie to be treated as applied in the order in which the debits and credits were set against each other in the account, each new credit being treated as discharging the earliest outstanding debit; but that that did not affect the true nature of the debt which, in the case of a current account, was a simple and undivided debt for the amount of the balance due on the account for the time being.

(2) That by making a payment generally on account the company made it on account of the balance outstanding and due at the date of payment, and that such a payment constituted a payment "in respect of" the balance for the purposes of section 23 (4) of the Limitation Act, 1939, so that time started running afresh for the purpose of the Act on July 10, 1953, and that the liquidator had, therefore, been wrong in rejecting any part of the applicant's proof of debt.

ADJOURNED SUMMONS.

A company, Footman Bower & Co. Ltd., carried on business as a cabinet maker. The applicant, S. Leboff Ltd., was a timber merchant. For many years the applicant supplied goods to the company for the purposes of its business. The account between the applicant and the company was kept as a current account. The applicant's sales ledger contained an account in the name of the company, in which the company was debited as goods were supplied from time to time with the price of the goods. The company from time to time made payments to the applicant on account generally, and credit was given in the applicant's sales ledger for these payments as they were made. The payments were made in sums of £50 or multiples of £50 and were not made in respect of any one or more particular debit or debits. The bought ledger of the company contained a corresponding account in the name of the applicant.

On August 11, 1953, a receiver and manager of the company's business was appointed by a secured creditor. At that date the aggregate unpaid balance owing to the applicant was £595 9s. 10d. The receiver continued the business of the company and continued to trade with the applicant; but he paid as he went, at first by a separate payment in respect of each delivery of goods, and later by a monthly payment of the precise amount owing for goods

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delivered to him during that month. On March 23, 1959, an order was made for the compulsory liquidation of the company.

The amount owing to the applicant by the company on March 23, 1953, six years before the date of the winding-up order, was £815 7s. 1d. During the period between March 23, 1953, and August 11, 1953, when the receiver was appointed, goods were supplied by the applicant to the company of a value of £80 2s. 9d. and, during the same period, the company made six payments each of £50, the last of such payments being made on July 10, 1953.

In April, 1959, the applicant lodged a proof of debt in the liquidation for a sum of £595 9s. 10d., " to balance of account." In December, 1960, the liquidator admitted the proof in the sum of £80 2s. 9d. and rejected the balance of £515 7s. 1d. on the ground that this part of the debt was statute-barred.

On December 29, 1960, the applicant issued a summons for an order, inter alia, (1) that the rejection by the liquidator of the applicant's proof of debt to the extent of £515 7s. 1d. on the ground that the last-mentioned debt had become statute-barred should be reversed, and (2) that the liquidator should admit the proof to dividend in full.

Muir Hunter (*David Graham* with him) for the applicant. The liquidator rejected part of the applicant's proof on the ground that it was barred by the Limitation Act, 1939, since it represented debts incurred more than six years before the winding-up order. The applicant contends that each of the six payments of round sums of £50 or £100 made between March 23 and August 11, 1953, was a part payment in respect of the whole balance due to the applicant at the date of such payment and that, therefore, under section 23 (4) of the Limitation Act, 1939, time started to run again from the date of each payment and that, since the last payment was within six years of the winding-up order, no part of the balance due to the applicant is statute-barred.

In *In re Seaber, Ex parte Seaber*[1] it was said that where there was a running account between the parties, as there was in the present case, and there were dealings between the parties within six years of the action to recover the debt, the Statutes of Limitation did not apply and the creditor could sue for the balance due to him: see also *In re Seaber, Ex parte Peachy.*[2] It is not necessary, in such a case, for the balance due to be

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[1] (1836) 1 Deac. 543.

[2] (1836) 1 Deac. 551.

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ascertained at the date of the payment in order that the case should be taken out of the Statutes of Limitation: *Walker* v. *Butler.*[3]

The debtor has the primary right to appropriate a payment to any debt he chooses. If he does not exercise that right, the creditor may appropriate the payment to any debt he pleases: see, e.g., *The Mecca.*[4] In the case of a current account, the rule in *Clayton's* case [5] applies and, prima facie, each payment is treated as discharging the earliest outstanding debt. However, this does not affect the operation of the Limitation Act. The rule in *Clayton's* case [5] implies an appropriation by the creditor and not by the debtor (see *Deeley* v. *Lloyds Bank Ltd.*[6]), and nothing done by the creditor can make a part payment a payment "in "respect of" any particular debt since, in considering in respect of what liability a payment is made under section 23 (4), it is the debtor's intention alone which has to be considered. Where a debtor makes a payment "on account generally," as the company did in the present case, that payment is a part payment "in respect of" the balance then due for the purposes of section 23 (4) so as to start time running again under the Limitation Act, 1939.

In the absence of express evidence identifying a payment with a particular liability, a payment on account revives or keeps alive the whole of the outstanding balance, save that the creditor cannot, by an appropriation of a payment at his will to part of a statute-barred debt, or to a statute-barred account, revive the remainder of that debt or that account for the purposes of rendering them enforceable again. There is a principle somewhat analogous to *Clayton's* case [7] which is applicable to revival by part payment, providing for revival back to the last sum in the account which is not already statute-barred: see *In re Boswell* [8] and the cases there cited.

Lloyd Stott for the liquidator. This case concerns a current account and, therefore, in the absence of any express appropriation, the rule in *Clayton's* case [9] applies, so that payments are treated as discharging the earliest outstanding debts in the account. Although *Clayton's* case [9] itself was concerned with a bank account, the rule there laid down also applies to any current

[3] (1856) 25 L.J.Q.B. 377.

[4] [1897] A.C. 286; 13 T.L.R. 339, H.L.

[5] (1816) 1 Mer. 572.

[6] [1912] A.C. 756; 29 T.L.R. 1, H.L.

[7] 1 Mer. 572.

[8] [1906] 2 Ch. 359.

[9] 1 Mer. 572.

account, and there is no reason why such rule should not govern not only the order in which debts comprised in a current account are discharged but also the question whether a part payment is made " in respect of " any particular item in the account within section 23 (4) of the Limitation Act, 1939: see *Deeley* v. *Lloyds Bank Ltd.*,[10] *Nash* v. *Hodgson*[11] and *In re Boswell.*[12] It is submitted, therefore, that where a part payment is made against a debtor's liability on a current account, that part payment must, for the purposes of section 23 (4) of the Limitation Act, 1939, be taken to have been made in respect of the earliest subsisting debts in the account which are not already statute-barred.

In the present case none of the debts in the account were statute-barred at the date of any of the part payments made between March 23 and August 11, 1953. The result, therefore, is that unless the court can, on the evidence, draw the inference that such payments were meant as an acknowledgment of the whole of the outstanding indebtedness on the account (see *Friend* v. *Young*[13]), they must be treated as discharging, and being " in " respect of," the earliest debts in the account and have no effect, so far as the Limitation Act, 1939, is concerned, on the balance which, since it represents debts incurred more than six years before the winding-up order, is now statute-barred. There is no evidence which supports the drawing of the inference that the payments were made in respect of the whole balance due on the date of each such payment and, therefore, they do not operate to start time running again in respect of that balance.

Cur. adv. vult.

March 16. BUCKLEY J. read the following judgment, in which he stated the facts and continued: The liquidator contends that, under the rule in *Clayton's* case,[1] the six payments, amounting to £300, made between March and August, 1953, must be treated as appropriated to the earliest debts which were outstanding on the account when such payments were respectively made, that is to say, to debits which arose before March 23, 1953, and were comprised in the balance of £815 7s. 1d. owing on that date. This would leave £515 7s. 1d. of that balance outstanding, which is the part of the proof which the liquidator has rejected.

The applicant contends that the payments made by the company within six years before the winding-up order were made in respect generally of the balance for the time being owing on the account, and that time runs under the Limitation Act, 1939, from the date of the last of those payments in respect of the whole of the balance remaining due on the account at that date.

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[10] [1912] A.C. 756.

[11] (1855) 6 De G.M. & G. 474.

[12] [1906] 2 Ch. 359.

[13] [1897] 2 Ch. 421.

[1] (1816) 1 Mer. 572.

Section 23 (4) of the Limitation Act, 1939, is in the following terms: "Where any right of action has accrued to recover any "debt or other liquidated pecuniary claim, or any claim to the "personal estate of a deceased person or to any share or interest "therein, and the person liable or accountable therefor acknow"ledges the claim or makes any payment in respect thereof, the "right shall be deemed to have accrued on and not before the date "of the acknowledgment or the last payment." Then there is a proviso which I need not read.

Ought the £50 paid on July 10, 1953, to be taken for the purposes of this section as paid in respect of the balance then outstanding on the account, or in respect of those particular debits in the account to which it would be treated as appropriated under the rule in *Clayton's* case? [2]

Where a debtor owes a creditor two or more separate and distinct debts, the rule as to appropriation of payments is that the debtor, when he makes a payment, has the primary right to say in respect of which debt it is made. If he does not exercise that right, then the creditor may appropriate the payment to any of the debts as he chooses. An appropriation by the debtor need not be in express terms, but must be communicated to the creditor or be capable of being inferred. Where some of the debts are at the date of payment statute-barred and others are not, it is to be inferred in the absence of evidence to the contrary that the payment is appropriated by the debtor to those not barred (*Nash* v. *Hodgson* [3]), but Lord Cranworth L.C. in that case said [4]: "What may be the effect where there is a single "debt consisting of several items some of which are barred, and "some not, may be doubtful." I think he there had in mind the kind of case with which I have to deal, except that in the present case no part of the balance outstanding at July 10, 1953, was then statute-barred.

Where there are distinct debts some of which are statute-barred and some not and the debtor makes a payment in such circumstances that the creditor can appropriate it as he chooses, the creditor may appropriate it to a statute-barred debt but this, under the law before the Limitation Act, 1939, did not revive his remedies in respect of any unsatisfied balance of that statute-barred debt because no promise on the part of the debtor to pay that balance could be inferred from the circumstances: see *Mills* v. *Fowkes*.[5] Before that Act there was no statutory provision that in the case of a simple contract debt part payment should stop time running under the Statute of Limitations. For a payment to have this effect it was necessary that it should amount to an acknowledgment of the debt and import a new promise to pay the outstanding balance. The mere act of the creditor appropriating a payment to a statute-barred debt could not have this effect, for such an acknowledgment and promise could only come from the debtor. Since the enactment of the Limitation Act, 1939, the position is different, for section 23 (4) now contains a statutory provision applicable to simple contract debts whereby any payment in respect of a debt will make time start to run afresh in respect of that debt. There is no longer need to establish a new promise to pay. In my judgment, however, one must still look at the act and intention of the debtor to see whether the payment is made in respect of the particular debt. Payment is in this subsection dealt with in close conjunction with acknowledgment. Just as an acknowledgment can only acquire that character by the act of the debtor or his agent, so also, I think, a payment can for the purposes of the subsection only acquire the characteristic of being made " in respect of " the debt by the act of the debtor or his agent. Consequently, in my judgment, appropriation by a creditor of a sum received from the debtor towards satisfaction of a particular debt, be it statute-barred or not, cannot make such appropriation a " payment in respect thereof " within the meaning of section 23 (4).

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[2] 1 Mer. 572.

[3] (1855) 6 De G.M. & G. 474.

[4] Ibid. 482.

In the present case no part of the balance outstanding on July 10, 1953, was then statute-barred, and, according to the evidence, the payments made by the company were made " generally on account," although on account of what is left to be inferred.

None of the cases I have so far referred to related to a current account. In *Clayton's* case[6] Sir William Grant M.R. was in fact dealing with a current account between banker and customer, but

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[5] (1839) 5 Bing.N.C. 455.

[6] 1 Mer. 572.

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the rule known as the rule in *Clayton's* case [7] applies to any current account and is, in my judgment, applicable to the present case. Consequently, in accordance with that rule, the various credits are prima facie to be treated as applied in the order in which the debits and credits are set against each other in the account, each new credit being treated as discharging the earliest outstanding debit. This method of analysing the account may be of great importance for the purpose of ascertaining various incidental matters affecting the debt; for instance, to what extent it is secured or guaranteed, where the security or guarantee extends to some only of the items in the account, or to what extent a former partner in a debtor firm is liable where there has been a change of the firm during the period covered by the account. It may also be of importance in ascertaining how far the balance in the account is contributed to by statute-barred items. It does not, however, in my view, affect the true nature of the debt itself. In the case of a current account, where the debtor-creditor relationship of the parties is recorded in one entire account, into which all liabilities and payments are carried in order of date as a course of dealing extending over a considerable period, the true nature of the debtor's liability is, in my judgment, a single and undivided debt for the amount of the balance due on the account for the time being, without regard to the several items which, as a matter of history, contribute to that balance. This was, I think, the view of Sir William Grant M.R. in *Clayton's* case,[8] for he said [9]: " But this is the case of a banking account, where " all the sums paid in form one blended fund, the parts of which " have no longer any distinct existence. Neither banker nor " customer ever thinks of saying, this draft is to be placed to " the account of the £500 paid in on Monday, and this other " to the account of the £500 paid in on Tuesday. There is a " fund of £1,000 to draw upon, and that is enough. In such " a case, there is no room for any other appropriation than " that which arises from the order in which the receipts and " payments take place, and are carried into the account. " Presumably, it is the sum first paid in, that is first drawn " out. It is the first item on the debit side of the account, " that is discharged, or reduced, by the first item on the credit " side. The appropriation is made by the very act of setting " the two items against each other. Upon that principle, all

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[7] 1 Mer. 572.

[8] Ibid.

[9] Ibid. 608.

"accounts current are settled, and particularly cash accounts." It was also, I think, the view of Lord Cranworth L.C. when, in the passage I have cited from *Nash* v. *Hodgson*,[10] he referred to a single debt consisting of several items. In the present case, the debits for goods supplied correspond to the sums paid in to which Sir William Grant M.R. referred[11] and, in my judgment, they constitute one blended obligation the parts of which have no longer any distinct existence. The rule in *Clayton's* case[12] merely provides a method of discovering how far the debtor is behindhand in discharging his obligation which has accrued piecemeal over a period of time, and which elements of that obligation remain in operation.

When, as in the present case, there is an account running between the parties which to the knowledge of both parties is of that kind and kept in that way, then, if the debtor makes a payment "generally on account," it appears to me that he must be taken to be making it on account generally of whatever is owing on the balance of the account. A payment "on account" imports an acknowledgment of a liability for a larger sum: see *Friend* v. *Young*,[13] *per* Stirling J.[14] When a payment is merely stated to be "on account" without the liability on account of which it is made being specified, one must first inquire what liabilities on the part of the payer to the recipient exist. If on inquiry it is found that the only liability is in respect of a balance due on current account, the natural conclusion to reach is, in my judgment, that the payment is made on account of that balance generally, not on account of any particular items contributing to that balance. Where, as may well have been the case as regards payments by the company to the applicant, a payment would in accordance with the rule in *Clayton's* case[15] be taken to discharge, say, three items on the debit side of the account entirely and a fourth in part, it appears to me that it would be an abuse of language to describe the payment as made "on "account" of those particular items. It would be still more fanciful, if at the date of payment the oldest outstanding debits were statute-barred. If (which has not yet, so far as I know, been decided) the inference that the debtor intended to appropriate the payment to non-statute-barred items to the exclusion of statute-barred items is applicable in the case of a current account—the point left open by Lord Cranworth L.C. in *Nash*

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[10] 6 De G.M. & G. 474, 482.

[11] 1 Mer. 572, 608.

[12] 1 Mer. 572.

[13] [1897] 2 Ch. 421.

[14] Ibid. 436.

[15] 1 Mer. 572.

v. *Hodgson*[16]—an analysis of the account would be required before the particular item or items on account of which the debtor is to be supposed to have made the payment could be identified. If, on the other hand, that inference would not arise, it would follow that the debtor would be supposed to have made the payment on account of statute-barred items. Either position would, in my opinion, be very artificial. The much more acceptable view seems to me to be that by making a payment generally on account the debtor makes it on account of the whole of his indebtedness, that is to say, on account of the balance outstanding and due at the date of payment.

Moreover, if, where the rule in *Clayton's* case[17] applies, either party is to be taken to have made an appropriation of the payment to any particular item or items, it must, I think, normally be the creditor who is taken to have done so: see *In re Sherry*,[18] *per* Lord Selborne L.C.[19] and *Deeley* v. *Lloyds Bank Ltd.*,[20] *per* Lord Shaw of Dunfermline.[21] As I have already said, an appropriation by the creditor could not, in my judgment, make the payment one which was "in respect of" the particular item or items to which it is so appropriated for the purpose of section 23 (4) of the Act.

Before 1939, it was established that, where a debtor made a part payment on account of an unascertained balance owing by him to the payee in such circumstances that the payment amounted to an acknowledgment on the part of the debtor of an account pending between himself and the payee on which a balance in excess of the amount of the payment would prove to be payable, a promise to pay the balance when ascertained ought to be inferred: see *Friend* v. *Young*,[22] *Walker* v. *Butler*,[23] and *Banner* v. *Berridge*,[24] *per* Kay J.[25] Since the enactment of the Limitation Act, 1939, such a payment, in my judgment, constitutes a payment "in respect of" the balance for the purposes of section 23 (4) of that Act.

I reach the conclusion that, in the present case, the payment made by the company on July 10, 1953 (and indeed each of the other five payments made after March 23, 1953), was made on account generally of the balance outstanding at the date of payment on the account current between the company and the applicant and was a payment " in respect of " that balance for the purposes of section 23 (4). Consequently, in my judgment, on the occasion of each of the payments time started to run afresh in respect of the balance then left outstanding. Accordingly, I think that the liquidator was mistaken in rejecting any part of the applicant's proof. I will reverse his partial rejection of the proof and direct that it be admitted in full.

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[16] 6 De G.M. & G. 474, 482.

[17] 1 Mer. 572.

[18] (1884) 25 Ch.D. 692, C.A.

[19] Ibid. 702.

[20] [1912] A.C. 756; 29 T.L.R. 1, H.L.

[21] [1912] A.C. 756, 783.

[22] [1897] 2 Ch. 421.

[23] (1856) 25 L.J.Q.B. 377.

[24] (1881) 18 Ch.D. 254.

[25] Ibid. 274.

Order accordingly.
Liquidator to pay applicant's costs.

Solicitors: *Matthew Trackman, Lifton & Cunnington; M. L. Spector.*

V. A. M.

DUNN AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS.

1961
March 16.

Wilberforce J.

[1960 D. No. 1846.]

Revenue—Estate duty—Aggregation—Settlement—Advance to remaindermen—Death of tenant for life leaving free estate of less than £10,000*—Whether sums advanced to be aggregated with settled property—Finance Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 43 (1)—*Finance Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 44), *s.* 33 (1).

By his will, a testator, who died in 1940, provided that two-thirds of his residuary estate should be held on trust for his son for life and after his death on trust for his issue. Between June and December, 1956, the trustees of the will advanced sums totalling £2,626 0s. 2d. to or for the benefit of the children of the tenant for life. The tenant for life died in December, 1956. At his death, the value of the property settled by the will exclusive of the sums advanced was £101,924 6s. 6d. and his free estate for the purposes of estate duty amounted to £6,292 18s. 4d. By virtue of section 43 of the Finance Act, 1940,[1] the sums advanced were deemed to be included in the property passing on the death of the tenant for life.

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[1] Finance Act, 1940, s. 43 (1): " Subject to the provisions of this " section, where an interest limited " to cease on a death has been dis- " posed of or has determined, whether " by surrender, assurance, divesting, " forfeiture or in any other manner " (except by the expiration of a fixed " period at the expiration of which " the interest was limited to cease), " whether wholly or partly, and " whether for value or not, after be- " coming an interest in possession,— " (*a*) if apart from the disposition or

On a summons to determine whether the sums advanced were, at the death of the tenant for life, settled property for the purposes of section 16 of the Finance Act, 1894, as amended by section 33 (1) of the Finance Act, 1954,[2] so as to be aggregable with the settled property passing on his death or formed part of the other property of the tenant for life so passing:—

Held, (1) that section 43 of the Finance Act, 1940, did not require that the property in question should be treated as if the disposition had not been made, but that the effect of the section was that the property should be treated as having been taken out of the settlement but nevertheless as being included in the property passing on the relevant death.

(2) That, under section 33 of the Finance Act, 1954, if at the date when it was necessary to ascertain whether estate duty was payable or not the property was comprised in a settlement, it should be dealt with as settled property but, if it was not, the character of settled property should not be attributed to it merely because it had been at some time subject to a settlement; and that, therefore, the sums advanced were not settled property and were not to be aggregated with the property settled by the testator's will but formed part of the other property of the tenant for life for the purposes of section 16 of the Finance Act, 1894, as amended.

Iveagh v. *Inland Revenue Commissioners* [1954] Ch. 364; [1954] 2 W.L.R. 494; [1954] 1 All E.R. 609 and *In re Demarest's Settlement Trusts* [1940] Ch. 661; 56 T.L.R. 602 considered.

ADJOURNED SUMMONS.

By his will dated November 9, 1938, Henry Dennis Readett-Bayley, K.B.E., directed, inter alia, that the trustees of the will should hold two-thirds of his residuary estate as therein defined on trust for his son, Thomas Dennis Readett-Bayley, for life and after his death on trust for his issue as therein declared. The testator died on February 28, 1940, and the will was proved by the executors and trustees named therein on October 22, 1940.

"determination the property in which "the interest subsisted would have "passed on the death under section "one of the Finance Act, 1894, that "property shall be deemed by virtue "of this section to be included as to "the whole thereof in the property "passing on the death; . . ."

[2] Finance Act, 1954, s. 33 (1): "For subsection (3) of section 16 of "the Finance Act, 1894, there shall "be substituted the following sub-"section:—'(3) Where the property "'passing on the deceased's death "'includes any such settled property "'as is hereinafter mentioned, then— "'(*a*) if the other property passing "'on the death, exclusive of that "'settled property and exclusive also "'of any property in respect of "'which estate duty neither is pay-"'able on the death nor would be if "'the duty were payable on estates "'of however small a principal value, "'is of a net value not exceeding ten "'thousand pounds, it shall not be "'aggregated with that settled pro-"'perty, but shall be an estate by "'itself . . .'"

Between June and December, 1956, the then trustees of the will, in exercise of the statutory power of advancement conferred upon them by section 32 of the Trustee Act, 1925, advanced sums totalling £2,500 to Robin Readett-Bayley, the son of the tenant for life, and a sum of £126 0s. 2d. to Jane Readett-Bayley, the daughter of the tenant for life.

The tenant for life died on December 7, 1956. At that date, the value of the two-thirds share in the testator's residuary estate in which the tenant for life was interested was £101,924 6s. 6d. and the free estate of the tenant for life for the purposes of estate duty amounted to £6,292 18s. 4d. The sums advanced by the trustees in 1956 to the children of the tenant for life were, by virtue of section 43 of the Finance Act, 1940, deemed to be included as to the whole thereof in the property passing on the death of the tenant for life. If those sums were to be aggregated with the settled property the amount of estate duty to be paid would be about £2,000 more than if they were not to be so aggregated but formed part of the other property passing on the death of the tenant for life for the purpose of section 16 of the Finance Act, 1894, as amended.

The present trustees of the will, Wilfred Lewis Dunn and Henry Norman Hanson, issued a summons asking the court to determine whether the sums advanced in 1956 by the then trustees of the will should be aggregated with the free estate of the tenant for life or with the settled property for the purpose of determining the estate duty for which the trustees were accountable on the death of the tenant for life.

H. H. Monroe Q.C. and *R. Buchanan Dunlop* for the trustees. The question is whether the sums of money which were advanced to the remaindermen, and which are deemed to be included in the property passing on the death of the tenant for life because he died within five years of the advance, are to be treated for estate duty purposes as settled property notwithstanding that, at the date of the death of the tenant for life, they were not, in fact, comprised in any settlement. It is admitted that estate duty is payable on the total amounts advanced and that the trustees, as the trustees of the testator's will, are accountable for that duty.

The trustees' submissions are: (1) The property referred to in section 43 of the Finance Act, 1940, in which the interest of the tenant for life subsisted and which would have passed on his death but for the determination of his interest therein is the money advanced to the remaindermen. Therefore, under section 43, that property is deemed to be included in the property passing on his death. (2) The property in respect of which the claim to duty arises is identified by reference to the date at which the life interest was determined, but its characteristics, i.e., its value, whether it still exists and whether it is settled property or not, have to be determined at the date of death. (3) The property referred to in section 33 (1) of the Finance Act, 1954, as property passing on the deceased's death includes property deemed to pass, and, therefore, the sums advanced are property which passes on the death for the purposes of section 33 (1). (4) The sums advanced were not settled property because they were not at the date of the relevant death (that of the tenant for life) comprised in any settlement. The dispute in this case is really confined to submission (4).

The claim to duty in respect of the sums advanced is made under section 43. The sums advanced were deemed to pass under section 43 because they would have passed if they had not been taken out of the settlement. They did not pass because they had been taken out of the settlement. They are charged to duty under section 43 for the very reason that they were taken out of the settlement. Therefore, the whole claim to duty under section 43 arises because the sums advanced were not settled property at the date of the death of the tenant for life.

There is no logical basis for the Crown's contention that they are to be treated as settled property. The Crown says that the effect of section 43 is that the property is deemed still to be comprised in the settlement and that it follows, therefore, that it is settled property. It is submitted that the deeming does not go as far as that. Section 43 does not say that property which has been unsettled shall be deemed not to have been unsettled; nor does it say that property taken out of a settlement shall be deemed still to be included in the settlement or shall be deemed still to be subject to the interest of the tenant for life. All it says is that property in which the interest of the life tenant has been determined shall be deemed nevertheless to pass on his death. The Crown's argument amounts to this—that property actually comprised in the settlement at the death is settled property and passes on the death, and that since property taken out of the settlement by way of advance is deemed to pass on the death it follows that it is also deemed still to be settled property. That is the logical fallacy of the Crown's argument.

Section 43 is a separate charging provision which creates one more class of property which is deemed to pass on the death. All section 43 does is to add property in which a life interest has determined within five years of the death of the categories of property passing on the death. It does not provide that the property shall be treated as if the advance which occasioned the determination of the life interest had never been made.

One has to identify the property advanced at the date of the advance and then value it and consider its situation at the date of the death: see *Iveagh* v. *Inland Revenue Commissioners*.[3] It was recognised by Upjohn J. in the *Iveagh* case[4] that if the property had disappeared or been taken out of the jurisdiction by the date of the life tenant's death it would not attract duty. Similarly, in the present case, the question whether the property is settled has to be considered at the date of the life tenant's death, and if it is not settled at that date it is not aggregated with the settled property.

In re Demarest's Settlement Trusts[5] is similar to the present case in that it concerned the question whether certain War Loan qualified for exemption from estate duty under section 47 of the Finance (No. 2) Act, 1915, which question had to be decided as at the date of the relevant death. The contention of the subject in the *Demarest* case[6] was that the War Loan, which was settled by the deceased within five years of his death, should be treated as if it had never left the deceased's estate. That contention, which is the same as the Crown's contention in the present case, was rejected.

E. Blanshard Stamp for the Crown. The words "settled "property" in section 33 of the Finance Act, 1954, are wide enough to include property which was settled, has been taken out of the settlement and is deemed to be included in the property passing on the death of the life tenant. Alternatively, the real question posed by section 43 is not what property is to be deemed to be included in the property passing on the death, but whether it is to be deemed to be included in the settled property or the free property. What is deemed to pass on the death is the exact property taken out of the settlement: see *per* Upjohn J. in the *Iveagh* case.[7]

Section 33 is a relieving provision and, on its true construction and having regard to the legislation of which it forms a part, it is intended to relieve the small free estate of a deceased person. It is intended to relieve the property of which the deceased could dispose and not the property of which he could not dispose. It is conceded that the construction for which the trustees contend is a possible construction. However, this section being a relieving section, the general principles of the construction of statutes apply to it and there is a presumption against a construction, such as that suggested by the trustees, which would produce absurd or whimsical results or which might involve an inquiry which was impossible to answer. Further, the trustees' construction defeats the whole object of the section, which is to relieve small free estates. In the case of a deceased person on whom was settled for life a trust fund of £30,000, and who had a free estate of £7,000, it is plain that if he died without anything having been done his free estate would be exempt from aggregation by section 33. If, within five years before the deceased's death, the trustees of the settlement transferred investments of a value of £15,000 to the remaindermen, then, if the trustees' contention is right, the exemption from aggregation would be lost, for, the sum of £15,000 being treated as part of the deceased's free estate, the free estate would exceed £10,000. Again, taking the same example, if the remaindermen settled the investments transferred to them on trust for themselves and their children, then, according to the trustees' construction of section 33, the property transferred would be settled property and the deceased's free estate would be free from aggregation. Yet again, if, in the same example, the remaindermen transferred the investments to a third party and it was not known who the third party was or what he had done with the investments, it would not be possible to say whether the property was settled or not. It is impossible to suppose that the legislature intended section 33 to have such absurd results.

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[3] [1954] Ch. 364; [1954] 2 W.L.R. 494; [1954] 1 All E.R. 609.

[4] [1954] Ch. 364, 379.

[5] [1940] Ch. 661; 56 T.L.R. 602.

[6] [1940] Ch. 661, 663.

[7] [1954] Ch. 364, 381.

To discover the intention of section 33, one may look at the legislation in existence before it came into force. Section 16 of the Finance Act, 1894, is headed "small estates" and refers to "property settled otherwise than by the will of the deceased." This would include property which had been settled but had been taken out of the settlement before the death. There is no material difference between section 16 and section 33. "Settled "property" is apt to include property which was settled by a settlement and which had been taken out of the settlement and which had not become the absolute property of the deceased. Section 33 emphasises the dichotomy between property with which the deceased could deal as he liked and property with which he could not so deal. Property with which the deceased was not free to deal should not be brought into the " other property " of the deceased referred to in section 33.

It is not right to say that section 43 only applies to the sums advanced because they are property which has been taken out of the settlement. It also applies where the property has not been taken out of the settlement, for example, where a tenant for life releases his interest in favour of a subsequent reversionary life tenant. The property is deemed to pass, not because it has been taken out of the settlement, but because the life interest in it has been determined. The answer to the question whether the property is deemed to be included in the settled property passing on the death or in the other property so passing is plainly that it is deemed to be included in the settled property because that is what it was before the determination of the life interest: see the *Iveagh* case.[8]

" Settled property " includes property which was settled at one time but is not settled at the death of the life tenant and is not restricted to property which stands settled at that date. The *Demarest* case [9] is of no assistance in the present case because there the words which were being construed were " so long as it " is shown . . . that the property is in the beneficial ownership " of a certain class of persons.

Monroe Q.C. in reply. If the trustees make an advance and the advancee resettles the property advanced, it is accepted that, if at the date of the death of the life tenant the property is comprised in any settlement, it is settled property within section 33. The Crown says that that would be a very difficult inquiry, but the possibility contemplated by the Crown in the *Iveagh* case [10] that one might have to find out whether the property was still situated in the United Kingdom might involve an equally difficult inquiry. This difficulty is inherent in this particular legislation. It was recognised in the *Iveagh* case [10] that liability to aggregation might depend on what was done with the property after the determination of the life interest but before the death.

If, as the Crown contends, " settled " in section 33 means " has ever been settled," one would have to go back to the time when the property first came into existence to see whether it had ever been settled. Such a construction produces results at least as absurd as those which the Crown suggests ensue from the construction for which the trustees contend.

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[8] [1954] Ch. 364, 380.

[9] [1940] Ch. 661.

[10] [1954] Ch. 364, 379.

WILBERFORCE J. stated the facts and continued: The relevant sections which I have to consider are basically two. There is, first, section 43 of the Finance Act, 1940, which imposes estate duty on property which has been the subject of dispositions such as those in this case, and the other relevant section is section 33 of the Finance Act, 1954, which, replacing section 16 of the Finance Act, 1894, provides for an exemption from aggregation with settled property of property other than settled property below a certain amount. The question I have to decide depends fundamentally on the construction of those two sections.

Section 43 (1) of the Finance Act, 1940, reads: "Subject to "the provisions of this section, where an interest limited to cease "on a death has been disposed of or has determined, whether by "surrender, assurance, divesting, forfeiture or in any other manner "(except by the expiration of a fixed period at the expiration of "which the interest was limited to cease), whether wholly or "partly, and whether for value or not, after becoming an interest "in possession,—(*a*) if apart from the disposition or determination "the property in which the interest subsisted would have passed "on the death under section one of the Finance Act, 1894, that "property shall be deemed by virtue of this section to be included "as to the whole thereof in the property passing on the death." Section 33 (1) of the Act of 1954 reads: "For subsection (3) of "section 16 of the Finance Act, 1894, there shall be substituted "the following subsection:—'(3) Where the property passing on "'the deceased's death includes any such settled property as is "'hereinafter mentioned, then—(*a*) if the other property passing "'on the death, exclusive of that settled property and exclusive "'also of any property in respect of which estate duty neither is "'payable on the death nor would be if the duty were payable on "'estates of however small a principal value, is of a net value not "'exceeding ten thousand pounds, it shall not be aggregated with "'that settled property, but shall be an estate by itself.'"

The sums with which I am directly concerned are the two sums totalling £2,626 0s. 2d., which in fact at the death of the tenant for life (that is the relevant date) were in the hands of the children of the tenant for life or of persons to whom they had been paid by or on behalf of those children; and it seems to me, thinking first of the natural meaning of words, that it would not be appropriate to describe those sums as settled property. On the contrary, they were property which had been taken out of settlement, and they were in the absolute disposition of the person or persons in whose hands they were. It seems to me that, if the Crown is to succeed in establishing that they are to be treated as settled property, it must do so either on the construction of section 43 or of section 33.

I take first section 43 of the Finance Act, 1940, and I see that subsection 1 (*a*) is divided into two parts. The first part lays down the conditions under which a charge can be made under that section, which, briefly, is that the property would have passed on the death, under section 1, if there had been no disposition of the kind mentioned by the section. That introduces a hypothesis which has to be superimposed on the existing state of affairs; and it requires me to assume for this purpose that the advance had not been made. Making that assumption, I of course come to the conclusion that the property would have passed on the death under section 1; and it seems to me that I am enabled thereby to identify the property which would have passed as the property which was the subject of the disposition, namely, the two sums of money. That is the first step. Then, having established the condition of liability, I have to find out what is the nature of the liability which is imposed, and the section says that the property shall be deemed by virtue of the section "to be included as to the whole thereof "in the property passing on the death." It seems to me that, although this is a deeming section, the effect of it is reasonably clear. It is simply to bring the property in question within the various categories of property which are included in the property which is to be charged under section 1 of the Finance Act, 1894, in much the same way as section 2 of that Act brings in other categories of property; and it does not require me to find that the property was to be treated precisely as if the disposition had not been made. I am not required under that section to go further than to say that the property passes on the death; I am not obliged to assume that the property remains settled property. On the contrary, I have to deal with it on the basis that it is not settled property but is property taken out of settlement, but, nevertheless, that is to be included in the property charged. Therefore, it does not seem to me that section 43 (1) (*a*) produces the result of requiring me to treat these sums in question as notionally settled property for the purposes of estate duty.

I pass, then, to section 33 of the Finance Act, 1954, in order to ascertain whether under that section I should treat these sums of money as settled property. I find that subsection (3) refers to "any such settled property as is hereinafter mentioned," and looking to see what is hereinafter mentioned I find the words " The " settled property above referred to is any settled property," with certain exceptions, so that I do not derive much elucidation from the section itself.

Then, it being provided by section 35 of the Act that the Act is to be construed together with the Finance Act, 1894, I look back at the principal Act to see whether I can derive any assistance as to what is meant by settled property, and in section 22 (1) (*h*) I find that the words " settled property " are defined as meaning " property comprised in a settlement." That fits in with the wording of section 33, because immediately after the so-called definition to which I have referred, one of the exceptions is of property comprised in a settlement made by the deceased.

It seems to me that, reading that section in its natural meaning, in particular paying attention to the words " property com-" prised in a settlement," I am called on to inquire what is the status of the property in question at the date when it is necessary to ascertain whether estate duty is payable or not, that is at the relevant death. If it is at that date comprised in a settlement or is settled property, it seems appropriate to deal with it as settled property, but, if it is not settled property, then I do not think that I am justified by this language in attributing to it the character of settled property simply because it has been at some time subject to a settlement.

Reliance was placed by the Crown, in supporting a rather extended interpretation of the expression " settled property," upon the previous section which was replaced by section 33, that is section 16 (3) of the Finance Act, 1894. That subsection, which provided a similar type of relieving provision, uses the expression " exclusive of property settled otherwise than by the will of the " deceased." I compare that with the language in section 33. I see that the exception has been to some extent altered by the later section, but I do not find any reason for attributing to the words in the earlier section " settled otherwise than by the will of " the deceased " the meaning which the Crown wishes me to place on the later section. Exactly the same problem would be raised under the earlier section of deciding what is the relevant date on which I have to ascertain the character of the property. Therefore I get no guidance as to the problem which I have to solve from the superseded provision.

Certain authorities have been referred to, which I must mention. The first, which is of importance and possibly of relevance, is the decision of Upjohn J. in *Iveagh* v. *Inland Revenue Commissioners.*[1] That case was concerned, so far as respects the second point, with a question of identification of the property which was claimed to be subject to estate duty; and, therefore, the problem with which the court was faced was a somewhat different problem from that which I have to consider, but Upjohn J. did examine and analyse section 43 of the Finance Act, 1940, and there are some expressions there which have been invoked by either side in this case. He said,[2] dealing with section 43, that the section was a " deeming " section, and continued: " It poses a hypothetical " state of affairs because ' the property ' mentioned in the section " is property in which the interest subsisting would have passed " on the death. Therefore the section appears to contemplate the " continuance of a hypothetical state of affairs, that is, a continu- " ance of the trusts of the settlement until the death." And again, after quoting from *Sneddon* v. *Lord Advocate*,[3] in the House of Lords, he says[4]: " . . . in considering section 43, one must " deal with it on the hypothesis that the property in that section " which would have passed is the property which was the actual " property that was transferred to the remainderman, and one " must assume that it would have remained in the settlement " down to the date of death."

Those passages were invoked by the Crown as supporting an argument that the settlement must be treated as notionally continuing until the death and, therefore, as to some extent affording support for the argument that property of this kind taken out of settlement is to be treated as notionally settled property. I do not think that Upjohn J. was dealing with or had in mind the particular problem which I have to consider. He was concerned with identifying the property which is to be the subject of the charge and that, as I have already pointed out, depends on the first part of the section in question, section 43 (1) (*a*), whereas the problem I have to deal with depends on the second part which says that the property is deemed to be included in the property passing on the death. It does not seem to me that the passages cited are concerned with the latter problem.

The taxpayer relies on *Iveagh* v. *Inland Revenue Commissioners*[5] for a passage where Upjohn J. said[6]: " Again, speaking

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[1] [1954] Ch. 364; [1954] 2 W.L.R. 494; [1954] 1 All E.R. 609.

[2] [1954] Ch. 364, 380.

[3] [1954] A.C. 257; [1954] 2 W.L.R. 211; [1954] 1 All E.R. 255, H.L.

[4] [1954] Ch. 364, 382.

[5] [1954] Ch. 364.

[6] Ibid. 382.

"for myself, I see nothing inconsistent with that interpretation of "the word 'property' where the trust continues with the interpretation which I have already given to that word where upon "the release the trust does not continue, for the simple reason "that the conception of the trust property must necessarily come "to an end when the property ceases to be trust property, and "becomes the absolute property of the remainderman." So it is said here that, when the advances were made, the sums of money in question ceased to be settled property and became the absolute property of the remaindermen, and that was their status at the relevant death, namely, the death of the tenant for life. While I would agree that that does seem to support to some extent the argument for the taxpayer, I feel that the problem which Upjohn J. had to consider in the *Iveagh* case [7] was different from that which I have to consider, and I would prefer to base my opinion on the wording of the section as related to the facts arising in this particular case.

The other authority cited was *In re Demarest's Settlement Trusts*,[8] a case concerned with estate duty on exempt securities. It is common ground that the actual decision in that case, depending, as it did, on the construction of section 47 of the Finance (No. 2) Act, 1915, is not of assistance here, but it was cited on behalf of the taxpayer for the argument in the case, which was concerned with the effect of the provisions of the estate duty legislation dealing with gifts and in which two rival views were canvassed in relation to gifts inter vivos; either that the subject-matter of gifts inter vivos is to be treated as if they had not been made and remained in the hands of the donor, or, on the other hand, that the subject-matter of the gift is taxed on the precise footing that it is not property of the donor and requires to be taxed under a special provision. I appreciate the analogy of the argument, but I do not think that there is any basis in judicial decision for saying one is more correct than the other, and I do not think that the decision assists me in the solution of the interpretation of section 33.

Certain anomalies have been urged as likely to arise from the construction which the taxpayer puts on this provision. In particular, it has been suggested that it is anomalous that the question of aggregation, and consequently of the rate of duty, should depend on action which may be taken by trustees of a settlement over whom the tenant for life has no control. It is, moreover, pointed out that the question into which compartment particular property may fall, whether settled property or non-settled property, may in certain cases depend upon what the recipients of the property in question may decide to do with it. I appreciate these anomalies and feel great difficulty about them; but it seems to me that it is likely, or at any rate possible, that the section in question had not in mind the particular case where property is taken out of settlement by means of advancement and that it is justifiable to assume that not all the consequences which might flow from such an action have been taken into account. At any rate, I do not feel that the existence of these anomalies provides me with sufficient basis for doing what in effect the Crown asks me to do, which is to treat these two sums of money, which de facto were not settled property at the death, as being for the purposes of this legislation settled property. If they were to be treated as settled property, it seems to me that I ought to find some section somewhere in the legislation which says that they are to be treated as settled property, and I do not find that either in the Finance Act, 1940, or in the Finance Act, 1954. Therefore, I must give effect to the section as it stands, leaving the anomalies, if any, which may arise to be faced as and when they arise and to be cured, if necessary, by the legislature.

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[7] [1954] Ch. 364.

[8] [1940] Ch. 661; 56 T.L.R. 602.

Declaration that the sums advanced formed part of the other property of the deceased tenant for life for the purposes of section 16 (3) *of the Finance Act*, 1894, *as amended.*
Plaintiffs' costs to be paid by the Crown.

Solicitors: *Johnson, Weatherall & Sturt for Acton, Simpson & Hanson, Nottingham; Solicitor of Inland Revenue.*

V. A. M.

C. A.

1961
March 21,
22, 23, 24.

Lord Evershed M.R., Upjohn and Pearson L.JJ.

In re PILKINGTON'S WILL TRUSTS.
PILKINGTON AND OTHERS *v.* PILKINGTON AND ANOTHER.

[1959 P. No. 987.]

Trusts—Power of advancement—Exercise of power—Statutory power—Fund held on trust for beneficiary for life and after his death for such of his children or remoter issue as he should appoint—Settlement for the benefit of infant child of beneficiary—Advancement of moiety of infant's expectant share on trusts of new settlement—Avoidance of death duties—Whether advancement for benefit of object of power—Whether rule against perpetuities infringed—Whether valid exercise of power of advancement—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 32.

Perpetuity Rule—Power of advancement—Power used for resettlement—Application of perpetuity rule.

Power of Appointment—Power of advancement—Perpetuity rule.

By his will a testator, who died in 1935, directed his trustees to hold the income of his residuary estate upon protective trusts in equal shares for certain beneficiaries living at his death with a provision that their consent to any exercise of any applicable power of advancement should not cause a forfeiture of their interests; and after the death of a beneficiary to hold the capital and income of such beneficiary's share for his or her children or remoter issue as he or she should appoint and in default of appointment for his or her children at 21. The will contained no provision replacing or excluding the power of advancement contained in section 32 of the Trustee Act, 1925.[1] One of the beneficiaries was married and had three infant children. The second child, a daughter, was born on December 29, 1956, and the trustees, for the purpose of avoiding death duties, desired to exercise the statutory power of advancement in her favour by applying up to one moiety of her expectant share in the residuary estate by adding it to a fund, which it was proposed should be subject to the trusts of a new settlement, under which the income of the fund was to be applied for her maintenance until she attained 21, and from then and until she attained 30 was to be paid to her, when the capital was to be held on trust for her absolutely. If she should die under that age, the trust fund was to be held upon trust for her children who should attain the age of 21 years and, subject as aforesaid, upon trust for the beneficiary's other children.

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[1] Trustee Act, 1925, s. 32. "(1) "Trustees may at any time or times "pay or apply any capital money "subject to a trust, for the advancement or benefit, in such manner as "they may, in their absolute discretion, think fit, of any person "entitled to the capital of the trust "property . . . Provided that—(*a*) "the money so paid or applied for the "advancement or benefit of any "person shall not exceed altogether "in amount one-half of the presumptive or vested share or interest "of that person in the trust "property . . ."

Danckwerts J. held that the power of advancement might be legitimately exercised by transferring a capital sum to the trustees of the proposed settlement:—

Held, (1) that the power conferred by section 32 of the Trustee Act, 1925, to apply capital moneys for the "advancement or "benefit" of a person entitled to the capital of trust property could only be exercised by reference to the actual circumstances of the object of the power requiring to be benefited at the time of the exercise of the power; and that it did not authorise a resettlement in the guise of an advancement by the creation of new trusts merely because the trustees thought that such new trusts would be more beneficial to the object of the power than those which the settlor had declared, and that there were no circumstances in reference to the beneficiary's infant daughter which justified at the present time the invocation of the powers conferred by section 32.

Lowther v. *Bentinck* (1874) L.R. 19 Eq. 166; *In re Joicey* [1915] 2 Ch. 115, C.A.; *In re Halsted's Will Trusts* [1937] 2 All E.R. 570; *In re Ropner's Settlement Trusts* [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332; *In re Wills' Will Trusts* [1959] Ch. 1; [1958] 3 W.L.R. 101; [1958] 2 All E.R. 472 and *In re Collard's Will Trusts* [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 considered.

Per Upjohn L.J. The power of advancement conferred by section 32 of the Trustee Act, 1925, is a special power and must be exercised within the period permitted by the rule against remoteness and its exercise must, for the purpose of the rule, be written into the instrument creating the power so that, if section 32 empowers trustees to make a settlement, they are exercising a special power subject to the rule against perpetuities; accordingly, that the trusts of the resettlement proposed by the trustees must be read into the testator's will and so read they infringe the rule, and even if section 163 of the Law of Property Act, 1925, would save the settlement by directing the trustees to hold the fund upon trust for the daughter at 21 years instead of at 30 years, it has not been shown that the trustees thought that a resettlement so cut down was for "the advancement or benefit" of the daughter. The proposed transfer to the trustees of the new settlement was on this ground also beyond the powers of the trustees (post, p. 489).

Decision of Danckwerts J. [1959] Ch. 699; [1959] 3 W.L.R. 116; [1959] 2 All E.R. 623 reversed.

APPEAL from Danckwerts J.[2]

By his will dated December 14, 1934, William Norman Pilkington directed his trustees to invest the residuary estate and to hold the fund upon trust in equal shares for all his nephews and nieces, therein defined as "the beneficiaries," being children of his brothers Lionel Edward Pilkington, Charles Raymond Pilkington and Guy Reginald Pilkington, living at his death who should attain the age of 21 years or being female marry under that age. The share of each beneficiary was, so far as is here material, settled upon express protective trusts for the benefit of the beneficiary during his or her life, with a provision that his or her consent to any exercise of any applicable power of advancement should not cause a forfeiture of the interest. After the death of a beneficiary, the capital and future income of the share of such beneficiary was to be held in trust for the children or remoter issue of such beneficiary as he should appoint, with a trust in default of appointment for the beneficiary's children on attaining the age of 21 years or marriage. If the trusts of the share of a beneficiary should fail, then it was to accrue to the other shares in the trust fund. The will contained no provision replacing or excluding the power of advancement conferred upon trustees by section 32 of the Trustee Act, 1925. The testator died on February 8, 1935, and his will was duly proved by his executors.

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[2] [1959] Ch. 699; [1959] 3 W.L.R. 116; [1959] 2 All E.R. 623.

The first defendant, Richard Godfrey Pilkington, a son of Guy Reginald Pilkington, was married with three children. His father, who was also a trustee of the will, was desirous of making a settlement in favour of the second defendant, Penelope Margaret Pilkington, the second child of Richard Godfrey Pilkington, who was born on December 29, 1956, and he proposed to his co-trustees that he should execute a settlement for the benefit of Penelope and that the trustees of the will should then exercise the power given by section 32 of the Trustee Act, 1925, by applying part of Penelope's expectant share in the testator's trust fund by adding it to the fund subject to the trusts of the proposed new settlement. Accordingly he paid £10 in cash to the trustees of the proposed settlement under which the trustees were directed to hold this sum, together with any further moneys (the intended total sum being £7,600) which were to be paid to them upon the following trusts: Until Penelope attained 21 years, or died under that age, the trustees were to have power at their discretion to apply the whole or any part of the income of the trust fund for the maintenance, education or benefit of Penelope as they thought fit and were to accumulate the residue of income as an addition to the capital of the trust fund with power to apply all or part of the accumulations as if they were income of the current year; if she should attain 21 years then until she attained 30 years, or died under that age, the trustees were to pay the income of the trust fund to her. The capital of the fund was to be held upon trust for her upon attaining 30 years absolutely; if Penelope died under the age of 30 leaving children or a child living at her death the trustees were to hold the fund and the income thereof in trust for all or any her children or child who should attain the age of 21 years, if more than one in equal shares, and in such event the trusts applicable until Penelope attained 21 were to apply to the children and the income of their expectant shares of the fund. Subject to these provisions, the trustees were to hold the fund in trust for all or any the children or child of Richard Godfrey Pilkington (other than Penelope) who being male attained 21 years or being female attained that age or married if more than one in equal shares. In the event of the failure of the trusts, the fund was to be held upon the trusts of the will of the testator applicable to the share of Richard Godfrey Pilkington as though he had died without being married. The power of advancement contained in section 32 of the Trustee Act, 1925, was expressly made applicable.

By this summons the trustees of the will asked whether they could lawfully exercise the powers conferred upon them by section 32 of the Trustee Act, 1925, in relation to Penelope's expectant interest in the testator's trust fund by applying (with the consent of Richard Godfrey Pilkington) up to one moiety of the capital of such interest so as to make it subject to the new proposed settlement, or whether such an application of the capital would be improper and unauthorised because: (a) Penelope's interest under the proposed settlement would vest at a date later than the date on which she attained a vested interest in her expectant share under the will of the testator; or (b) the trusts of the new settlement, if contained in the will of the testator, would be void for perpetuity.

Danckwerts J. held that the power of advancement might be legitimately exercised by paying some part of the capital of Penelope's share (not exceeding one moiety) to the trustees of the proposed settlement and so as to make it subject to the trusts, powers and provisions of such settlement and, since the power of advancement took the property advanced out of the original settlement, the relevant period for the purposes of the rule against perpetuities was to be determined by reference to the proposed settlement and the power could accordingly be exercised in the manner proposed.

On July 18, 1960, the Court of Appeal, on the motion of the plaintiffs, ordered that the Commissioners of Inland Revenue might be added as parties and further that (notwithstanding that the time for appealing had expired) the plaintiffs or the commissioners might be at liberty to appeal from the order of Danckwerts J.

C. A.

1961

Pilkington's Will Trusts, *In re.*

The Commissioners of Inland Revenue appealed. The grounds of their appeal were that the order was wrong in law:

(1) Because the proposed transaction was nothing less than a resettlement of the capital over which it extended upon trusts and with and subject to powers and discretions not contained or contemplated by the testator's will and not authorised by the power of advancement contained in section 32 and because it was irrelevant that the trustees thought that it was for the benefit of Penelope that it should be so resettled.

(2) Because to resettle any part of the capital of the share of a beneficiary was not within the meaning of the phrase "to pay "or apply any capital money" subject to a trust.

(3) Because upon the true construction of the section the power of advancement thereby conferred upon trustees to pay or apply any capital money subject to a trust for the advancement or benefit of any person entitled to the capital of the trust property or of any share therein did not extend to enable such trustees to deprive such person of the interest in property conferred upon him by the trust instrument or to declare new or other trusts affecting such capital or share or to do any act or thing in relation to the trust property which would operate to deprive such person of such interest or to subject such capital or share to such new or other trusts.

(4) Because the power of advancement might only be exercised to accelerate and, if necessary, enlarge the interest of the person sought to be advanced and not to postpone or reduce it.

(5) Because the effect of the proposed transaction would be to deprive Penelope of her existing contingent interest in the capital sought to be subjected to the trusts of the proposed new settlement and to subject such capital to trusts which differed from those declared by the will and to postpone and reduce Penelope's interest in such capital.

(6) Because *In re Fox*[3] and *In re Joicey*[4] are authority for the proposition that a power of advancement did not enable the trustees to alter the devolution of the estate or to destroy the contingent interest of the person sought to be advanced.

(7) Because the authorities upon which Danckwerts J. relied, properly understood, did not decide the contrary or, if they did, were wrongly decided.

(8) Because, if contrary to the contention of the Commissioners of Inland Revenue the said power of advancement

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[3] [1904] 1 Ch. 480.

[4] [1915] 2 Ch. 115.

extended to enable the trustees to subject the capital to new or other trusts, and thereby to postpone or reduce the interest of Penelope, the validity or otherwise of any such new or other trusts in relation to the rule against perpetuities fell to be tested by considering whether they would have been within the rule if they had been declared by the testator's will.

(9) Because the trusts in favour of Penelope and her children declared by the proposed new settlement would have been void for remoteness if contained in the testator's will.

(10) Because the subjection of any part of the capital of the expectant share of Penelope to the trusts, powers and provisions of the proposed new settlement would be an unlawful delegation of the trusts, powers and provisions of the will.

(11) Because under the trusts of the proposed new settlement persons who were not objects of the power of advancement (and in particular Penelope's children) were beneficiaries, and the proposed transaction was accordingly a transaction in excess of the said power.

Peter Foster Q.C. and *E. Blanshard Stamp* for the appellants, the Commissioners of Inland Revenue. There are five main grounds on which the proposal of the trustees of the testator's will to pay part of the capital of Penelope's share to the trustees of the new settlement is not a proper exercise of the statutory power of advancement conferred by section 32 of the Trustee Act, 1925. The first ground is that the statutory power can only be used to enlarge a beneficiary's interest and not to postpone or reduce it. The power can neither be used to alter the devolution or to destroy a beneficiary's contingent interest. A wide construction has been put by the courts on the words " apply " and " benefit," but these words must be construed in the context of section 32. The court is asked not to read the words " advancement or " benefit " disjunctively. " Advancement " is a narrow word appropriate to payments made in early youth. " Benefit " has a wider meaning. It is agreed that the section authorises a capital payment to be made to an adult to enable him to make a settlement. The case of an infant is different. Under the will Penelope has an interest contingent on attaining 21, which is liable to be defeated by the exercise of her father's power of appointment. Under the proposed settlement she only attains a vested interest at 30.

The second ground of the appeal is that the proposed exercise of the power would offend the rule delegatus non potest delegare.

That rule applies to powers of advancement as well as to powers of appointment. The third ground of appeal is that non-objects of the power are included in the settlement. Penelope's children who take under the settlement are not objects of the power. The fourth ground of appeal is that the proposed exercise of the power is nothing less than a resettlement and cannot come within the words "pay or apply." However wide a construction is placed on the word "apply," it cannot mean "resettle." The fifth ground of appeal is that the proposed resettlement infringes the rule against perpetuities.

Passing to the authorities; *In re Ropner's Settlement Trusts* [5] is the first case of the exercise of the statutory power of advancement by the settlement by trustees of moneys advanced to an infant. It is not stated there what were the trusts of the proposed settlement. It is submitted that that case was wrongly decided. In *In re Gosset's Settlement* [6] the advance was taken out of settlement. The object of a power of advancement can ask for an advance and, if it is made, he can himself settle the sum advanced. That is what was done in that case and is, it is submitted, a proper use of a power of advancement. That decision also shows the difference between a power of appointment and a power of advancement. *Lawrie* v. *Bankes* [7] and *In re Kershaw's Trusts* [8] show that once a sum has been advanced to a beneficiary, in the absence of fraud, it is taken out of settlement. In *Roper-Curzon* v. *Roper-Curzon* [9] the advance was to an adult son, who himself settled the advance. The distinction between a power of appointment and a power of advancement is that a contingent interest may be altered by the exercise of a power of appointment. Such an interest cannot be altered by the exercise of a power of advancement: *Hood* v. *Franklin.*[10] [Reference was also made to *Lowther* v. *Bentinck,*[11] *In re Aldridge,*[12] *In re Fox* [13] and *In re Churchill.*[14]]

Secondly, it appears from the observations of Eve J. in *In re Greenslade* [15] and from the decision of the Court of Appeal in *In re Joicey* [16] that a power of advancement is similar to a power of appointment and that trustees cannot delegate its exercise.

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[5] [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332.
[6] (1854) 19 Beav. 529.
[7] (1857) 4 K. & J. 142.
[8] (1868) L.R. 6 Eq. 322.
[9] (1871) L.R. 11 Eq. 452.
[10] (1873) L.R. 16 Eq. 496.
[11] (1874) L.R. 19 Eq. 166.
[12] (1860) 55 L.T. 554.
[13] [1904] 1 Ch. 480.
[14] [1909] 2 Ch. 431.
[15] [1915] 1 Ch. 155, 169.
[16] [1915] 2 Ch. 115.

The decisions in *In re May's Settlement*[17] and *In re Mewburn's Settlement Trust*[18] presuppose that the power of advancement only authorises acceleration by payment in advance. *In re Boulton's Settlement*[19] deals with an appointment in favour of non-objects of a power; the principle of that decision applies to powers of advancement. In *In re Halsted's Will Trusts*[20] it was held that the trustees of a settlement could advance funds to the trustees of a settlement, but the settlement in that case was made by the beneficiary himself and not by the trustees. *In re Morris's Settlement Trusts*[21] is authority for the proposition that the power of advancement cannot be delegated. In *In re Vestey's Settlement*[22] it was held that a power to " apply " income authorised the setting apart of income for an infant. The right to contend that that decision of the Court of Appeal was too wide is reserved. In *In re Ropner's Settlement Trusts*[23] Harman J. wrongly held that a payment to the trustees of a settlement was an advance to an infant. The court is asked to overrule that decision. *In re Wills' Will Trusts*[24] was a simple case of an advancement.

With regard to the application of the rule against perpetuities to powers of advancement; if such a power authorises a resettlement, the power must be a special power and not a general power and the trusts must be read back into the original will: *In re Fane*[25]; Farwell on Powers, 3rd ed., p. 225; Morris & Leach on the Rule Against Perpetuities, p. 141.

The appeal should be allowed on any of the above five grounds.

E. Blanshard Stamp following. Under the testator's will Penelope will get her share of her father's portion of the settled fund if she attains the age of 21 years. Under the proposed resettlement her interest will not vest until she attains 30 years. The power of advancement does not authorise trustees to alter the devolution of the trust fund. If the trustees are right, they could settle Penelope's share after she had attained 21. The effect of the respondents' contention is that they can do anything with Penelope's share which they think is for her benefit. They are claiming to do what a person having a power of appointment in favour of Penelope could not do. A power of advancement is inserted in the new settlement. That is a delegation of the power. If the trustees are right, a power of advancement authorises trustees to make a new settlement introducing new beneficiaries who are not objects of the power. *In re May's Settlement* [26] shows that a power of advancement is of a limited nature; that decision is authority for the proposition that the power does not authorise a resettlement. *In re Mewburn's Settlement* [27] is to the like effect. *In re Ropner's Settlement Trusts* [28] is the only reported case where the power has been used to settle an infant's property: it was decided without argument. As to the decision in *Roper-Curzon* [29] and *Halsted*,[30] in each the plaintiff beneficiary asked the trustees to make an advance by transferring the advance to the trustees of a settlement to be made by him. The beneficiaries could have asked the trustees to pay their debts.

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[17] [1926] Ch. 136.

[18] [1934] Ch. 112.

[19] [1928] Ch. 703.

[20] [1937] 2 All E.R. 570.

[21] [1951] 2 All E.R. 528.

[22] [1951] Ch. 209; [1950] 2 All E.R. 891.

[23] [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332.

[24] [1959] Ch. 1; [1958] 3 W.L.R. 101; [1958] 3 All E.R. 472.

[25] [1913] 1 Ch. 404; 29 T.L.R. 306.

B. L. Bathurst Q.C. and *James Cunliffe* for the trustees. The position below was that since there was no party willing to argue that the power was not exercisable, the trustees accordingly did so. The Commissioners of Inland Revenue are now parties. It should have been possible to have made them parties in the first instance.

Sir Milner Holland Q.C. and *Eric Griffith* for the defendants Richard Godfrey Pilkington and Penelope Margaret Pilkington. It is wrong to say, as the appellants do, that this settlement damages Penelope. Before any exercise of the power of advancement, her interest is contingent on her attaining 21 years and is liable to defeasance by the exercise of the father's power of appointment. If part of her share is settled, she will immediately become entitled to income for her maintenance and if she attains 30 years her interest in capital will become indefeasibly vested. Having regard to her father's age, the probabilities are that she would not become entitled to capital at 30. The proposed settlement has been made by a third person to facilitate payment by the trustees. The settlement is not solely aimed at saving estate duty. The exercise of a power of advancement accelerates the interest of the beneficiary advanced. That is the effect of this settlement. Reliance is placed on the word "benefit" in the context of section 32. There is no reported case in which a power of advancement has been held to have been invalidly exercised. Unless the observations of Jessel M.R. in *Lowther* v. *Bentinck*[31] are wrong on the meaning of "benefit," they are cogent here. They were adopted in *In re Halsted's Will Trusts*[32]; Farwell J. there held that a power to benefit A included power to benefit other persons for whom A was under some obligation. The power of advancement is not limited to accelerating the beneficiary's interest. The trustees can do what is for the benefit of the person advanced. The "benefit" must be conferred when the power is exercised. The proposed settlement is for Penelope's benefit. An income is immediately made available for her and her interest in capital is accelerated and made indefeasible. Part of the benefit is that estate duty will be saved on her father's death.

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[26] [1926] Ch. 136.

[27] [1934] Ch. 112.

[28] [1956] 1 W.L.R. 902.

[29] L.R. 11 Eq. 452.

[30] [1937] 2 All E.R. 570.

A second objection to the proposed settlement was that it is a delegation of the trustees' power, since the settlement confers on the trustees of the settlement powers of maintenance and advancement. A power of maintenance is inserted in all settlements. There has been no delegation giving power to take property away from Penelope. It must be assumed that any exercise of the power of advancement would be for her benefit. In *In re Morris's Settlement Trusts*[33] it was stated that a power of advancement could be put into a power of appointment. If it is not a delegation when inserted in a power of appointment, it is not a delegation when inserted in a power of advancement. In *In re Joicey*[34] the trustees were given power to cut down the appointed share. There is no such power in this settlement. The mere inclusion of a power of advancement is not a delegation of the power.

The next objection to the settlement was that non-objects of the power are included and that the power could not have been exercised in their favour. The decisions in *Roper-Curzon*[35] and *Halsted*[36] show that a power of advancement can be used to benefit third persons.

The next objection raised was that the proposed settlement does not fall within the phrase "pay or apply." Assuming that the proposed settlement is for Penelope's "benefit," it is an "application" for her benefit. The effect of the proposed settlement will be to save estate duty. The settlement is in fact a rescue operation.

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[31] L.R. 19 Eq. 166.

[32] [1937] 2 All E.R. 570.

[33] [1951] 2 All E.R. 528.

[34] [1915] 2 Ch. 115.

[35] L.R. 11 Eq. 452.

[36] [1937] 2 All E.R. 570.

The last objection was that the trusts have to be read back into the will and they are bad unless they are saved by section 163 of the Law of Property Act, 1925. If the other points are decided in the respondents' favour, the perpetuity rule does not apply. If this is a proper exercise of the power of advancement, the fund advanced is taken out of the trusts and the trusts of the proposed settlement have not to be read back into the will. There is no authority on this point.

B. L. Bathurst Q.C. for the trustees. The proposed settlement is for Penelope's benefit. Under it she gets an immediate income and the capital is tied up until she attains 30. The trustees take the view that it is not desirable that a girl should have at her disposal a considerable capital sum when she attains 21 years. No reasonable person could think that the proposed settlement was not for Penelope's benefit.

Peter Foster Q.C. in reply. The merits of the proposal are not in dispute. If the trustees of the will had power to create this settlement it would be beneficial. The Crown contends that the transaction is not within the power conferred by section 32. The court can look at the heading of this part of the Act. It is "Maintenance, Advancement and Protective Trusts": Maxwell on the Interpretation of Statutes, 10th ed., p. 50. Powers of advancement are used to advance capital to a particular person for a particular purpose. Both in *Roper-Curzon*[37] and *Halsted*[38] an adult beneficiary asked that capital should be advanced to the trustees of a settlement he had made. The trustees there did not do the settling. With regard to maintenance: it is for the trustees of the new settlement to decide what income is applied for Penelope's maintenance. That is clearly a delegation. The proposed settlement is not within the power "to pay or apply." A variation of the trusts of the will is not a "payment" or "application." If there is power to resettle, that is a special power and the proposed resettlement infringes the rule against perpetuities.

Lord Evershed M.R. The problem raised by this appeal is, so far as reported authority goes, in large degree novel, as it is novel in form. The Crown have been added as parties for the purposes of this appeal and have, therefore, argued the case before us for the view that what is intended is something outside the scope of the statutory power of advancement contained in the

[37] L.R. 11 Eq. 452.

[38] [1937] 2 All E.R. 570.

relevant will. That will was made some two months before his death in February, 1935, by William Norman Pilkington. It is a will of considerable elaboration, and, after a number of legacies and other provisions, the residue of his estate was left upon trust in equal shares if more than one for all or any of his nephews and nieces, being children of three named brothers, living at his death, who should attain the age of 21 years or marry under that age. The gift of residue was followed by a number of other clauses which had the effect of qualifying what appeared to be the absolute gift to these nephews and nieces so that their interests, though remaining contingent on attaining 21, became life interests with final gifts in favour of their children, that is, to the testator's grand nephews and grand nieces. There were included the usual powers of appointment, of applying income for maintenance and the like. The power of advancement, as it is commonly and briefly called, was incorporated into the will from section 32 of the Trustee Act, 1925, and it is, therefore, essential that I should refer at once to the language of the first subsection: "Trustees "may at any time or times pay or apply any capital money "subject to a trust, for the advancement or benefit, in such "manner as they may, in their absolute discretion, think fit, of "any person entitled to the capital of the trust property or of any "share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, "or subject to a gift over on his death under any specified age or "on the occurrence of any other event, and whether in possession "or in remainder or reversion, and such payment or application "may be made notwithstanding that the interest of such person "is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the "class to which he belongs." It is said that the language which I have read from the Trustee Act, 1925, substantially reflects what had become the practice of conveyancers of inserting into settlements or wills powers of advancement, and again I use the convenient label. To what extent that is so, is a matter upon which I am not confident that I could express any very firm view, more particularly since I do have in mind what was said by Jessel M.R. in *Lowther* v. *Bentinck*.[1] The corresponding power in the will there before the court was thus: "the "testator declared that it should be lawful for the trustees at "any time or times during the life of Francis William Lowther,

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[1] (1874) L.R. 19 Eq. 166, 167, 168.

"to levy and raise any part of the trust moneys, stocks, funds, "and securities, not exceeding in the whole one moiety thereof, "and to apply the same in or towards the preferment or "advancement of Francis William Lowther, or otherwise for his "benefit, in such manner as the trustees should in their discretion think fit." Mr. Cookson, in argument before Jessel M.R., said: "This is not an ordinary advancement clause, such "as is found in wills or settlements containing provisions for the "benefit of infants." And it is certain that Jessel M.R.'s view was that the words of the clause there before him should be given their sense according to the English language. "It seems "to me," he said,[2] "that the words 'or otherwise for his benefit' "are evidently put in for the purpose of not confining the "trustees to preferment or advancement; and therefore, so far "from finding any context which restricts the words, I think "the context shows that the words could not mean something "of the same kind." That is to say, he rejected the view that "or otherwise for his benefit" was to be treated as meaning something ejusdem generis with what might be called, in a strict use of the word, advancement.

Is, then, the transaction with which we are concerned within the contemplation of that phraseology? I have found this matter one of considerable difficulty. I am conscious that views have been taken about this matter which may have affected many settlements, and it is a subject upon which practitioners in the Chancery Division, I gather, have taken sometimes one view and sometimes another. After, I confess, some changes of view in the course of the argument, I have, in the end, come to the conclusion that the question now before us, which I have tried to pose, ought to be answered in the negative. I think the question has been formulated most properly, and for my purposes most conveniently, in the first paragraph of the notice of appeal. The ground for the appeal is stated in this form: "Because the proposed transaction is nothing less than a resettlement of the "capital over which it extends upon trusts and with and subject "to powers and discretions not contained or contemplated by the "testator's will and not authorised by the power of advancement "contained in the said section, and because it is irrelevant that "the trustees think it for the benefit of the defendant Penelope "Margaret Pilkington that it should be so resettled."

It is obviously necessary at this stage that I should say something about the transaction, as I have called it, which is here in question. It has taken this form. It is intended that a settlement shall be executed by Colonel Guy Pilkington, who is one of the brothers of the testator, and who is the grandfather of the child mentioned in the notice of appeal, to whom I will hereafter allude as "Penelope." The trustees of this settlement are, in fact, the same persons as are the trustees of the testator's will, and it recites that the settlor is desirous of making provision for the benefit of Penelope. Penelope was born on December 29, 1956, so that on the date when this document was exhibited to the affidavit in support of the summons, she was somewhat less than 2½ years of age. The terms of the settlement proposed to be made (which was incidentally of the sum of £10 in cash) were that the trust money and any other moneys which the trustees might receive should be invested in the usual way, and should then be held upon trust so that, until Penelope was 21, the income should be available for her maintenance, education and the like. From the age of 21 to 30 she should be entitled to receive the income, and then, on her attaining 30 years of age, she was to be entitled to the capital, and there followed provisions so that if she were to die under 30 leaving children, those children would take the capital, and if she did not leave children, then there were trusts over. Clause 9 of this document reads: "The "power of advancement contained in section 32 of the Trustee "Act, 1925, shall apply." I do not intend to attempt any kind of definition by way of limitation or otherwise of the vital language which I have already read from the first subsection of section 32 of the Trustee Act. But, to my mind, the power which is conferred by that section contemplates something being done for the advancement or benefit (and I accept entirely what Jessel M.R. said, that "benefit" should be construed in the widest sense) of the particular person in question, according as that course may seem to be called for by the circumstances at the time, that is at the time when the advancement or benefit is conferred. I would observe from the subsection that it is intended to deal with capital of the trust fund, and to deal with the case of a person who is entitled to some share in the capital of the trust fund which, for one reason or another, he or she cannot at the time touch, either because it is liable to be divested or because his or her interest is contingent, or because it is subject to some prior interest. In those circumstances, the subsection contemplates that, subject to the limitation as to amount in the first proviso, and to such other limitations as there are, the trustees are entitled to take part of the capital out of the trust fund, to liberate it from the trusts which prevent the person concerned receiving it or enjoying it, and then to make it available or apply it for the benefit of the person concerned; but, as I have indicated and as I construe it, in the light of the circumstances affecting that person as they then exist.

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[2] L.R. 19 Eq. 166, 170.

What I have said has, at any rate, the support of the language of Pickford L.J. in *In re Joicey.*[3] When I look at this settlement it seems to me that it does not, as a matter of common sense, fulfil that qualification. As Lord Maugham observed in *In re Mewburn,*[4] these are matters which may strike one mind one way and one mind another. I have very high regard, if I may say so, in a matter such as this for the view of the judge from whom this appeal comes; but it has seemed to me, looking at it against the background which I have tried to state, that what is proposed does not fall within the contemplation of the statutory power. I cannot escape the conclusion that it is in truth a resettlement, an addition of supplementary trusts to those which you find in the original will, which I am fully prepared to assume the trustees quite properly think is for the benefit of the various persons concerned, including Penelope; though I cannot persuade myself that it really relates to Penelope and her benefit in the sense which I think the section contemplates. There has been some discussion of the question of the avoiding, for the benefit of those concerned, of liability to taxation, and quite properly doing so. *In re Collard's Will Trusts,*[5] to which our attention was called by Sir Milner, is an example of what is now accepted, that, if you can prevent the diminution of the trust estate by the impost of taxation, that is a perfectly legitimate thing to do, and is clearly a benefit to those who are interested in the fund. It is quite true also, as Mr. Bathurst pointed out, that you can enumerate advantages which will result to Penelope. She will have an income available and immediately available for her maintenance. She will have that without having to suffer herself, unless she has other funds I know not of, the imposition of surtax. Her capital, the capital here in question, cannot be divested by any exercise of the power of appointment by her father, the testator's nephew, and if her father should live, as seems reasonable to hope since he is only 42, for five years, then the sum which is proposed to be transferred to the trustees of the intended settlement will not bear estate duty which otherwise might be imposed. The last of Mr. Bathurst's advantages is reflected in something in the affidavit of Mr. Winder supporting the summons, that, although she will be entitled to the income at 21, she will not get the capital until she is 30, and so she "would be protected "from the risk that she might at the age of 21 or on her earlier "marriage be able to dissipate the capital of the amount so "applied." This child is now four and upwards, and who can tell what, in the twentieth century, her interests will be, and for what her talents may fit her? She might become a member of a great profession, she might become an artist, a musician, a politician or an explorer. She might, on the other hand, follow the example of domesticity which was more common in past centuries. But can it be said, and ought it to be said now, that she should be in the position when she cannot "dissipate," and I would qualify that by saying, "or alternatively use," capital at 21, or only do so if the trustees then think it would be for her benefit? It seems to me that it cannot be in contemplation in a statutory power of this sort as applied to a will that you should assume all these things about a child aged two or three and not, as I think the clause intends, deal with the problem when really in some sensible form it arises for determination. The advantages which Mr. Bathurst enumerated are, to my mind, of an impersonal kind when related to Penelope, whereas, according to my understanding of the section, the advancement or benefit intended should be personal to the person concerned, in the sense of being related to his or her own real or personal needs. All the many cases to which our attention was properly drawn, as it seems to me, were cases where, for one reason or another, it was desirable that a fund should be made available to meet a particular circumstance affecting a particular person, though it does not follow (and there are instances which show it) that all you can do or ought to do is to hand over a capital sum. I have said that because I, for my part, am not prepared to accept and make a general rule of certain of the propositions by which Mr. Foster supported the case for the Crown. I prefer strictly to confine myself to the facts of this case, and the impression which my mind has formed upon this transaction, and to give, in regard to it, the answer which I think is in accordance with the contemplation of the statutory language. Thus, I am not saying anything which might cast any doubt on transactions which might involve the making of some settlement in some form or another, doing the kind of thing that was done, for example, in *In re Halsted*,[6] decided by Farwell J., or by Maugham J. in *Mewburn's* case.[7] And I also bear in mind again what Buckley J. said in *Collard's* case,[8] on which I most certainly do not desire to cast any doubt, namely, that if what is to be achieved can quite properly be achieved by two documents, it is no necessary objection that you happen to do it by one.

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[3] [1915] 2 Ch. 115, 122.

[4] [1934] Ch. 112.

[5] [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821.

I will add a word or two about the grounds on which Mr. Foster, in opening the case, founded his objections. First, I would not like to accept the view that this section only contemplates acceleration as distinct from postponement. That, no doubt, is a form of words, but it is, if Mr. Foster will forgive me for saying so, merely a form of words, and I do not think you can improve upon the matter, certainly not try to qualify or expound the fairly clear words of this statute, by introducing some such formula: no postponement, only acceleration. Similarly, I would not accept that anything which appeared to involve, or might be said at first sight to involve, an infringement of the rule delegatus non potest delegare is of itself necessarily fatal to what is done. Again, I think it depends on the circumstances and the form of the transaction. And instances have been cited from the cases which show that if, in other respects, what is done is fairly within what I take to be the intendment of the statute, it is no objection that, as ancillary to what is done, you would confer powers, including powers of advancement, which might, if you looked at it otherwise and with great strictness, be thought at first blush to involve some encroachment on that principle. Nor, as a somewhat similar ground, would I condemn this transaction, so far as this matter is concerned, by saying there are persons who would be entitled to benefit who are not objects of the benefaction under the original will, namely, issue of Penelope. Again, the cases which I have cited show that if what is done is being done as an exercise of what I think the section contemplates, it may not be an objection that there are added to it provisions which will, or might, result in persons taking a benefit who were not themselves objects of the original settlement or will. I also cannot attach so narrow a significance as Mr. Foster would suggest, I think, with all respect to him, to the words "pay "or apply." I think, as a matter of English, if you have a fund available, you can be said to apply it for the benefit of some person in any manner you like by quite an elaborate transaction.

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[6] [1937] 2 All E.R. 570.

[7] [1934] Ch. 112.

[8] [1961] 2 W.L.R. 415.

Of those grounds put forward, however, I have, I confess, felt more force in the problem raised by reference to the rule against perpetuities. In the circumstances of this case, I would prefer myself not to express any concluded view. It is plain that if the transaction to be entered into, in purported exercise of the power of advancement, postpones final distribution of the funds to a date that would not have been legitimate in the original will and settlement, then there may be difficulty over the rule against perpetuities. Unless you can say that the fund, the sum of money which is made the subject of the new settlement in the exercise of the power, has been altogether severed from the original settlement so that it makes, so to speak, a new start, it involves considering whether the trusts of the new document ought to be treated in some sense as read into, and by way of qualification or expansion of, the trusts of the original document. Put in other and familiar phraseology, it might depend on whether you thought that the power of advancement as exercised was in the nature of a special power.

In the present case it is to be noted that the trustees have not merely declared new trusts of part of the funds in their hands as trustees of Mr. Pilkington's will. What they have done or what they propose to do is in effect this: They say: It so happens that there is another settlement made by someone else and what we are going to do is to take part of the testator's capital and transfer it to the trustees of this other convenient settlement, which is a settlement for the benefit of Penelope, and therefore there is a complete break and you avoid the problem of perpetuities. By perhaps a parity, if not an inversion, of the reasoning which appealed to Buckley J. in *Collard's* case,[8] I find it a little difficult to think that the transaction can be looked at quite so disjunctively. And there is the difficulty that, unless that be so, then at what point can the sum become the subject-matter of the new settlement—become, so to speak, free of any subsisting trusts? For the trustees themselves would have no power to make a settlement in this form for the benefit of Penelope and her issue. On the other hand, it might be that if the other settlement, to the trustees of which the transfer is to be made, had a wholly independent existence, then, other things being equal, the trustees might in consideration of the circumstances of the day as they affected a particular beneficiary, say: "The best thing we can do for this person now is to take part

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Pilkington's Will Trusts, *In re.*

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"of the capital of the trust fund and hand it over to this other "subsisting trust," and if that were done, you might avoid any question of perpetuity and you might in other respects, as I have indicated, be within the scope and intendment of the section. For myself, therefore, I prefer to express no view upon the perpetuity question.

I come back in the end, therefore, to the simple point which is one—and I repeat Lord Maugham's language—which might appeal to different minds in different ways. I do not attempt any further definition of the language of section 32. I venture to suggest that it means what it says, but I do not forget, as Mr. Foster pointed out, that it is, after all, contained in a group of sections which bears the statutory cross-heading: "Maintenance, "advancement and protective trusts," and that cross-heading, at least to my mind, emphasises the point, which has in the end influenced my mind, that the exercise of the power, if truly within the section, must be an exercise done to meet the circumstances as they present themselves in regard to a person within the scope of the section, whose circumstances call for that to be done which the trustees think fit to do. Unless this be so, I see no limitation to the scope of the power. I hope that I have not in anything that I have said suggested that the trustees in this case have not been acting in what they properly feel to be the best interests of those whom it is their duty to look after. It is no part of the Crown's argument so to suggest, and, indeed, the presence of the Crown, though it has been of great assistance to the court, might in some sense have been an embarrassment to the Crown because they were arguing in a sense an academic case.

But I hope I have not transgressed the limits within which the court has to decide this matter, and without further repetition, I have, in the end, concluded that the first ground stated in the notice of appeal correctly states what the position is, with the result that we should hold, in my judgment, that what is proposed to be done is not within the intendment of the statutory power of advancement, and that this appeal should be allowed.

Upjohn L.J. I agree, and in deference to the judge from whom we are differing and the arguments that have been presented to us, I propose to add a few words of my own, although I agree with all that has fallen from my Lord. I start with the assumption that the proposed new trusts (if valid) are for the benefit of Penelope: certainly any reasonable body of trustees may properly think so, and I do not myself dissent from that view.

The bona fides of the trustees is not in question and they do not surrender their discretion to the court. The sole question, therefore, is whether the proposed transaction of raising and applying the sum of £7,000 to £8,000 out of Penelope's expectant share under her great-uncle's will and transferring it to new trustees upon the trusts of another settlement is within the powers of the trustees. That question depends entirely on whether they are so empowered by virtue of section 32 of the Trustee Act, 1925. Sir Milner Holland has argued that, having regard to the very wide construction that has been put on the word "benefit" by Jessel M.R. in *Lowther* v. *Bentinck*[9] and followed by Farwell J. in *In re Halsted*,[10] once the trustees are satisfied that it is for the benefit of Penelope, it must follow that to carry out the transaction must be within the powers of the trustees under section 32. There being no challenge to the propriety of the exercise of their powers, it follows, therefore, that the proposed transaction is necessarily, so it has been argued, a proper one. That is a very attractive argument and makes necessary a close examination of the true scope and ambit of the powers conferred upon trustees by section 32.

As is well known and was pointed out by Maugham J., in *In re Mewburn*,[11] section 32 produced in statutory form the power which had for many years been inserted in all properly drawn instruments, rendering it unnecessary to insert such powers in such documents in future. It must not, however, be overlooked that the power is one which, if the settlor so desires, may be excluded altogether or varied, as indeed was recently done in *In re Collard*.[12] The section, therefore, must be considered in the light of its historical background and of judicial interpretations of similarly expressed powers of advancement in pre-1926 settlements. Furthermore (and in my judgment this is very important) it must never be forgotten that the power of advancement, whether expressed in the settlement or incorporated by virtue of section 32, is essentially a power which is ancillary to the trusts declared by the settlor, and when exercised in favour of the object of the power, operates in derogation of the beneficial trusts declared by the settlor.

With those preliminary observations I propose to mention one or two cases to which we have been referred to illustrate how the power of advancement has been exercised in the past, and I use the words "power of advancement" as including the wide form of words to be found in section 32. The normal and usual exercise of a power of advancement is the raising and application of a sum of money out of the expectant share of the object of the power by paying it directly to him or applying it for his benefit; for example, to buy him a business or to pay his debts or (in the old days) to buy him a commission in the army. In such cases the trustees are merely anticipating his interest in the trust fund, but the exercise of the power is not, however, necessarily confined to that type of advancement. In special circumstances and provided (and this I think is essential) it is for the benefit of the object of the power, the power may be exercised in favour of non-objects; see, for example, in *In re Kershaw's Trusts*,[13] where money was raised to purchase a business in England for the husband of the object of the power, the circumstances being that otherwise he would have to leave his wife and children and reside abroad. Then again, provided always that it is for the benefit of the object of the power, in special circumstances it may be proper to raise money and hold it upon trusts for his benefit and for others in succession who may be non-objects, such as the wife and children of the object of the power and possibly remoter issue: see *Roper-Curzon* v. *Roper-Curzon*[14] and *In re Halsted*.[15] The extent of the class of non-objects who may take under such settlements has not yet been judicially defined and probably is incapable of definition, for it must depend on the particular circumstances of each case. No reported case, however, apart from in *In re Ropner*,[16] decided by Harman J. without argument, has gone so far as to authorise trustees to raise money for the benefit of the object of the power merely because the trustees bona fide thought that it was for his benefit but there was no evidence of any circumstances making it desirable to benefit the particular object of the power on that particular occasion.

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[9] (1874) L.R. 19 Eq. 166.

[10] [1937] 2 All E.R. 570.

[11] [1934] Ch. 112.

[12] [1961] 2 W.L.R. 415.

Like my Lord, I do not think it is possible to lay down any rule as to the ambit of the powers conferred by section 32, except to say that the exercise of the power must have reference to the actual circumstances of the object of the power requiring to be benefited at the time of the exercise of the power

My Lord has referred to *In re Joicey*.[17] I propose to refer to this case in greater detail, making clear, however, that it is only relevant for the contrast drawn by two judges of that court between the exercise of a wide and unlimited power and the exercise of the ordinary power of advancement. The daughter of the settlor had a power of appointment and she exercised that power of appointment, and added this: "provided always that the said "trustees shall (if and so far as I can authorise the same) have "power from time to time or at any time during the said period "of twenty-one years in their absolute discretion to transfer and "make over the share or shares for the time being of the "appointed funds of any son of mine who shall have attained the "age of twenty-one years or any part of such share or shares to "such son for his own use absolutely." That power was held to be far beyond a power of advancement and to be invalid as a delegation of the power of appointment conferred upon the appointor. Pickford L.J., as he then was, referring to this power, said this [18]: "I do not think it is a power of maintenance or "advancement at all. It is not confined in any way to circum"stances requiring maintenance or advancement and may be "exercised by the trustees irrespective of such considerations." Warrington L.J. said this [19]: "It is not even a mere power of "advancement which might possibly be said to be so common an "incident to such interests as the donee has here created as to be "fairly within the words 'in such matter in all respects'—as to "this I express no opinion. It is, I think, impossible to deny that "under the provision in question the trustees might of their own "mere motion and without reference to the circumstances of the "son or any other consideration convert a contingent interest into "an absolute one and thus completely alter the dispositions made "by the testatrix."

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[13] (1868) L.R. 6 Eq. 322.
[14] (1871) L.R. 11 Eq. 452.
[15] [1937] 2 All E.R. 570.
[16] [1956] 1 W.L.R. 902.
[17] [1915] 2 Ch. 115.

Those observations assist the conclusion which, like my Lord, I reach independently, that the power conferred by section 32 is not to be exercised by the trustees without reference to the particular circumstances of the object of the power requiring to be advanced at the time of its exercise.

As I ventured to point out in *In re Wills' Will Trusts*,[20] the section does not, in my judgment, permit the trustees, under the guise of making an advancement, to create new trusts or to make a resettlement merely because they think that such new trusts or new settlement will be more beneficial to the object of the power than those which the settlor has chosen to declare. There must be some particular circumstance which justifies the exercise

[18] [1915] 2 Ch. 115, 122.

[19] Ibid. 123.

[20] [1959] Ch. 1; [1958] 3 W.L.R. 101; [1958] 2 All E.R. 472.

of the power in favour of the object of the power at that particular time in the manner then proposed. But the mere creation of new trusts, in my judgment, in this particular case is just what the trustees, acting, of course, perfectly bona fide, are trying to do. On the facts of this case, I cannot see that there are any circumstances in reference to this child of under five with a rich father aged 42, well capable of providing for her and her education, which can justify at the present time—and I emphasise those last four words—the invocation of the powers conferred by section 32. I agree with my Lord that paragraph 1 of the notice of appeal gives the true picture of what the trustees are attempting to do, and I think that is beyond their powers.

I desire to add a few words on the application to this case of the rule against perpetuities. In the ordinary conventional case where an advancement is made to an adult who can settle the sum advanced to him, no doubt no question as to reading back a new settlement into the head settlement would arise, but in this case the object of the power, being of tender years, is incapable of making any settlement. Consequently, the trustees can only justify the making of a settlement provided it is within the powers conferred upon them by section 32. That is plainly a special power and, of course, the trusts created by virtue of the exercise of the power must conform to the rule against remoteness. Moreover, being a special power it is clear that the exercise must, for the purpose of the rule, be written into the instrument creating the power: see *In re Fane*,[21] *per* Buckley L.J.

To this the answer was made, and accepted by the judge, that a sum advanced is taken out of the settlement for all purposes and, therefore, in the case of a power of advancement, the new settlement ought not to be read back into the testator's will. No doubt the law has been stated that a sum advanced is taken out of the settlement for all purposes: see *In re Fox*,[22] and the cases there referred to. But examination of that case and of the earlier cases shows that they were all cases where a sum had been advanced to the object of the power out and out, and questions arose as to whether, as in *Lawrie* v. *Bankes*,[23] the purpose having failed, the object of the power ought to repay it to the trustees or might keep it. In *In re Fox*[24] the question was whether the sum advanced had to be brought into hotchpot. It was held in those cases that the payment having been made out and out, the sum did not have to be repaid in the one case or accounted for in the other. But none of the cases touch or, indeed, could touch on any question relating to the rule against perpetuities because, being out and out payments, it could not arise. It is a cardinal rule that the observations of judges and the law as stated by them must be read in relation to the issues which they had to try, and their remarks cannot safely be applied to questions which could not have been in the judges' minds at the time. The position seems to me to be this. Section 32 either empowers the trustees to make a settlement or it does not. If the former, they are exercising a special power of advancement conferred by section 32, and exercising that special power, it must be subject to the usual rule for the purposes of the rule against perpetuities. If they have no power to make a settlement, cadit quaestio. The one thing which it seems to me they cannot do in law is to say: Let us make an out and out advancement and then transfer it to the trustees of the existing settlement and that is a new settlement which need not be read back into the will. All they can do is to say: Under the powers conferred by section 32 we are going to create a new settlement containing new trusts. It matters not whether they themselves declare the trusts, or whether they hand it over to the trustees of an existing trust, whose terms are thought to be appropriate to the circumstances. They are still plainly exercising a special power, and it seems to me, therefore, that these new trusts must, for the purposes of the rule against perpetuities, be read into the testator's will.

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[21] [1913] 1 Ch. 404, 413; 29 T.L.R. 306, C.A.

[22] [1904] 1 Ch. 480.

[23] (1857) 4 K. & J. 142.

[24] [1904] 1 Ch. 480.

What, then, is the consequence of that? I must examine briefly the terms of the new settlement. I am content to assume that the gift of income to Penelope from the time that she shall attain the age of 21 years until she shall attain the age of 30 years is good, but the next direction that the trustees shall hold the capital of the trust fund upon trust for Penelope if she shall attain the age of 30 years absolutely, is prima facie bad. It may be—the question has not been argued before us—that section 163 of the Law of Property Act, 1925, saves it. If it does save it, it does so by directing the trustees to hold the capital of the trust fund for Penelope absolutely upon attaining the age of 21 years. The next trust for the children of Penelope, if she shall die under the age of 30 years, is plainly bad on any footing. The effect, therefore, of the rule against perpetuities upon the proposed settlement is basic: it entirely alters the settlement, and that seems to me to be fatal to this case, for the trustees have never been asked to express any opinion as to whether they would think the proposed settlement, modified by reason of the rule against perpetuities in the manner I have mentioned, is for the benefit of Penelope. That is a matter to which they have never addressed their minds, and, therefore, it cannot possibly be justified under section 32, for it has not been shown that the trustees think that the settlement, as so modified, is for the advancement or benefit of Penelope. On that ground too, therefore, I would think that the transfer to the trustees of this new settlement is entirely beyond the powers of the trustees.

I would only add one further matter and that is that I think Danckwerts J. (as he then was) has read more into certain observations which I made in *In re Wills' Will Trusts* [25] than I intended or, with all respect, than is justifiable on reading what I said. In the passage which he quoted [26] I pointed out the general rule that a person upon whom powers are conferred cannot delegate those powers, unless he is expressly authorised so to do. That rule applies, as I venture to think I was quite right in saying, not only to a person exercising a power of appointment but to a person exercising a power of advancement.

For those reasons I would allow this appeal.

PEARSON L.J. I agree, for the reasons which have been given by my Lords, that the proposed transaction would not be a valid exercise of the powers conferred by section 32 of the Trustee Act, 1925. I do not find it necessary to express any opinion with regard to the application to this case of the rule against perpetuities. I agree that the appeal should be allowed.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue*; *Alsop, Stevens & Co.*

B. A. B.

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[25] [1959] Ch. 1, 12.

[26] [1959] Ch. 699, 706.

In re A SOLICITOR.

1961
Mar. 14, 15,
17, 20, 29.

Cross J.

[1960 P. No. 1143.]

Solicitor — Costs — Taxation — Bill — Payment of bill — Application by client for reference to taxing master for taxation—Summons heard more than 12 *months after bill paid—Jurisdiction—Inherent jurisdiction of court—Whether curtailed by statute—Solicitors Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 27), *s.* 69 (1) (2).

In May, 1959, R. engaged a solicitor to act for him in an action against him relating to the beneficial ownership of shares in a company, threatened bankruptcy proceedings and other claims. R. understood from the solicitor that he would have to pay a maximum of about £5,000 for all the work. On October 19, 1959, the solicitor submitted a bill for almost £500 for the work in the bankruptcy proceedings, which R. paid. The action relating to the shares resulted in a settlement satisfactory to R. in that he was left with £90,000 after payment of his liabilities. On November 25, 1959, the solicitor delivered his bill for work in the action for a total of £3,805, of which £82 was for counsel's fees, £48 for disbursements, and £3,675 for solicitor's fees. R. wrote at the foot of the bill "I "agree and approve and will settle as soon as possible." On December 22, 1959, the solicitor, acting within his authority, paid himself the bill out of funds of R. in his hands. On February 28, 1960, the solicitor presented R. with ten further bills totalling £4,609 in respect of the outstanding claims, each bill including charges for work done before November, 1959, and the largest of which was later reduced from £3,517 to £2,100 by the Law Society. The bills submitted by the solicitor amounted in all to almost £9,000, of which £330 was for disbursements and the balance of £8,600 for solicitor's fees.

On a summons issued by R. on May 12, 1960, under the Solicitors Act, 1957,[1] asking that the bill of November 25, 1959, for £3,805 might be referred to the taxing master to tax and settle:—

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[1] Solicitors Act, 1957, s. 69: "(1) "On the application, made within "one month of the delivery of a solicitor's bill, of the party chargeable "therewith, the High Court shall, "without requiring any sum to be "paid into court, order that the bill "shall be taxed and that no action "shall be commenced thereon until "the taxation is completed. (2) If "no such application is made within "the period mentioned in the last "foregoing subsection, then, on the "application either of the solicitor or "of the party chargeable with the "bill, the court may, upon such "terms, if any, as they think fit (not "being terms as to the costs of the "taxation), order—(*a*) that the bill "shall be taxed; (*b*) that, until the "taxation is completed, no action "shall be commenced on the bill, and "any action already commenced be "stayed: Provided that—(i) if twelve "months have expired from the "delivery of the bill, or if the bill "has been paid, or if a verdict has "been obtained or a writ of inquiry "executed in an action for the recovery of the costs covered thereby, "no order shall be made on the application of the party chargeable with "the bill except in special circumstances and, if an order is made, it

Held, (1) that the court had no jurisdiction under section 69 (2) of the Act of 1957, to order taxation of the bill, since at the date of the order more than 12 months would have passed since the bill had been paid.

(2) But that the inherent jurisdiction of the court over solicitors to tax a bill which had been paid more than 12 months before the hearing of the summons for taxation had not been taken away by the Solicitors Acts; that the size of the bill and the delivery of the ten further bills were "special circumstances" within the meaning of section 69 (2) (*b*) (i) of the Act of 1957, which would have entitled R. to an order for taxation if the summons had been heard within 12 months of the date of the payment of the bill; and that, therefore, in the exercise of its inherent jurisdiction, the court would order taxation of the solicitor's fees (post, p. 503).

Storer & Co. v. *Johnson* (1890) 15 App.Cas. 203, H.L. applied.

Per curiam. Section 66 of the Solicitors Act, 1932 (now section 69 of the Solicitors Act, 1957) effected an unintentional change in the law in that, under section 41 of the Solicitors Act, 1843, the 12-month period was 12 months before the application to tax was made and not 12 months before the order on that application was made, and it is to be hoped that the point may be considered by the appropriate authority and that, when opportunity offers, the position as it was under the Act of 1843 may be restored (post, p. 502).

ADJOURNED SUMMONS.

The following statement of the facts is taken from the judgment of Cross J.: Robert Affleck Robertson, the managing director of a company, Bowmakers Ltd., fraudulently converted large sums belonging to it to his own use. For this he was in April, 1957, sentenced to imprisonment for seven years. For some years previously he had been concerned with others in substantial purchases of shares in Bowmakers, and shortly before his conviction an action was started by one Harry Geoffrey Bentley against him and a number of other defendants (the "Bentley action") raising the question of the beneficial ownership of these shares. The action proceeded in a leisurely way, the statement of claim being amended and further claimants to some of the shares added as defendants, but by May, 1959, the position had been reached that Robertson would have to put in a defence if the action was not to go against him by default. To add to his difficulties Bowmakers, who had themselves brought an action against him, were threatening him with bankruptcy. Further, several other people who had

"may contain such terms as regards "the costs of the taxation as the "court may think fit; (ii) in no event "shall any such order be made after "the expiration of twelve months "from the payment of the bill."

claims against him were pressing them. Robertson had solicitors acting for him in the Bentley action, but in May, 1959, on the advice of Neville Coleman, the solicitor who had acted for him in his prosecution, he decided to leave them and employ Sidney Pearlman to act for him in the Bentley action, the threatened bankruptcy proceedings, and the other claims. On May 19, 1959, Pearlman had an interview with Robertson in Wormwood Scrubs prison at which Robertson explained the position of his affairs in outline and inquired what Pearlman's charges were likely to amount to. At this point there was some conflict of evidence. It was common ground that a figure of £5,000 was mentioned, but whereas Pearlman said that that was his rough estimate of his costs of the Bentley action, Robertson said that he understood it to be an estimate of all that he would have to pay Pearlman. It did not matter whose recollection on that point was right. The figure of £5,000 must, on any view, have been a mere guess since no one could say for certain whether the Bentley action was going to be fought or settled or what other work would have to be done. The only relevance of the matter was that Robertson got it into his head that £5,000 was roughly the maximum which he would have to pay Pearlman for getting him out of his difficulties.

Pearlman next proceeded to look into Robertson's affairs. There was a chest full of papers which he had to go through, necessarily without the assistance of his client, and there was no doubt that he put in many hours of hard work. Robertson had heavy liabilities amounting possibly to as much as £250,000. On the other hand, if he could establish his title to a sufficient number of the shares in dispute in the Bentley action he might emerge not only solvent but a comparatively wealthy man. By May 25, 1959, Pearlman was able to submit papers to Chancery counsel for advice on the position, and a few weeks later he instructed bankruptcy counsel to settle Robertson's affidavit in opposition to the petition, which had been presented on May 27. The two counsel had a joint conference attended by Pearlman on June 26. The next day, June 27, Chancery counsel and Pearlman had an interview with Robertson in prison and on July 25 Pearlman visited him in prison again, in company with bankruptcy counsel. An application had to be made to the court for leave to extend the time for Robertson's defence in the Bentley action, but that was given and a defence was put in on July 31. Pearlman visited Robertson again in prison on August 25 and October 4. In that month the bankruptcy petition which had been adjourned was dismissed by agreement with the petitioning creditors who were made to realise that they stood a better chance of being paid if they allowed Robertson to settle the Bentley action on advantageous terms than if they made him bankrupt. On November 5, Pearlman and the solicitors acting for the other parties in the Bentley action visited Wormwood Scrubs and terms of settlement were agreed. The settlement was very satisfactory from Robertson's point of view for under it he became entitled to a sufficient number of the shares, which had meanwhile risen greatly in value, to enable him to pay off all his liabilities and be left with some £90,000.

On October 19 Pearlman had sent Robertson his bill of costs in the bankruptcy proceedings, pointing out in the covering letter that this bill did not cover his costs in the Bentley action which was then still on foot. The bankruptcy bill was for a total of about £500 made up of counsel's fees, £92 odd, other disbursements, £17 odd, and a fee of £387 odd for Pearlman. The bill contained a general description of the work done by Pearlman of which the following were the most material parts: "Instructions "for affidavit in support of notice to dispute necessitating going "through very large chest of papers left with me, sorting same "and extracting therefrom those papers and documents which "appeared to be relevant for the purposes of your affidavit, perus-"ing and considering these documents, the pleadings and volum-"inous documents relating to the action commenced by Harry "Geoffrey Bentley, the pleadings and documents in the action "brought against you by Bowmaker Ltd., against Coutts & Co., "examination of all these documents for the purpose of ascertain-"ing the issues between the parties and the points involved with "a view to finding out your general and financial position for the "purpose of disputing the petition, preparing from such informa-"tion a statement showing your financial position and a schedule "of assets and liabilities, making various inquiries regarding the "various actions and from the result of my research and investiga-"tion giving careful consideration to the position to enable me to "deal with the question of solvency. Drawing affidavit and "instructions to counsel to settle and attending him therewith." Then there was a reference to two conferences attended by counsel which were stated to have been both at Wormwood Scrubs, though one was in fact in Lincoln's Inn. The bill continued: "Preparing "application to abridge the time for the hearing of the petition. . . . "The work involved necessitated the perusal of documents com-"prising many thousands of folios and occupied the attention of "principal for approximately 22 hours. The attendances at

"Wormwood Scrubs prison were each of 3½ hours duration. The "attendances upon the petitioning creditors' solicitors as to a "compromise occupied approximately 5 hours. The matter was "one of great importance, was of perplexity and required "exceptional care and skill in its conduct, the whole of the work "being done exclusively by principal."

With Robertson's approval the bankruptcy bill was debited by Pearlman against funds in his hands belonging to Robertson and Robertson did not seek to have that bill taxed. On November 25 Pearlman sent Robertson his bill of costs in the Bentley action, saying that he and Coleman would visit him in prison on November 29 to discuss any matters which he might wish to discuss. The Bentley bill was for a total of £3,805 odd, made up of counsel's fees, £82 odd, other disbursements, £47 odd, and a fee of 3,500 guineas for Pearlman. The work covered by that fee was described in the bill as follows: "Fee by way of general "instructions, care and responsibility involving: Journeys to "Wormwood Scrubs prison for interviews with you on May 19, "1959, June 27, 1959, August 25, 1959, October 4, 1959, and "November 5, 1959—engaged in all 33 hours. Going through "large chest of papers handed to me and sorting out those "required for the purpose of ascertaining the position—engaged "7 hours. Perusing and considering papers sorted out for the "purposes of ascertaining the position of various matters, the "allegations made against you and your general and financial "position—engaged 14 hours. Perusing and considering pleadings and documents relating to this action—engaged 7 hours. "Time engaged in drafting instructions to counsel to advise and "settle pleadings—engaged 6 hours. Attendances at conferences "with counsel and with papers. Giving consideration to the "possibility of a settlement of the action and the terms upon "which such a settlement could take place to your advantage "and the documents necessary for carrying into effect any terms "of settlement agreed. The matter was one of extreme difficulty "owing to the nature of the pleadings and the number of parties "involved, and required exceptional care and skill in its handling "and attention; the amount involved was some hundreds of "thousands of pounds and was of great importance to the client. "The ultimate terms of settlement effected resulted in the whole "of the debts of the client to the extent of approximately "£200,000 being cleared and leaving him with a surplus of some "£60,000," which Cross J. thought was an under-statement. Then, after reference to the number of letters and documents involved and telephone discussions, the bill concluded: "The "degree of care and responsibility was very great, having regard "to the matters mentioned (3,500 guineas)."

At the interview in prison on November 29, Robertson and Pearlman discussed what remained to be done. That fell into two parts, the first the sale of the shares or of a sufficient number of them to discharge Robertson's liabilities, and secondly the settlement of the other outstanding claims which were comparatively small. Robertson certainly knew that he would be called upon to pay Pearlman other fees beyond the bankruptcy bill which he had paid and the Bentley bill which had been sent to him, but he said, and Cross J. accepted his evidence, that he did not expect Pearlman's further charges to exceed about a thousand pounds, though he did not discuss their amount with him. Robertson wrote at the foot of the Bentley bill: "I agree "and approve and will settle as soon as possible." When he handed back the bill to Pearlman he said that it was "shocking." Pearlman said that this was said laughingly, but Robertson disagreed. Robertson did not, however, suggest that Pearlman put any pressure on him to agree the bill or to pay it. On December 22 Pearlman paid himself the Bentley bill out of funds in his hands belonging to Robertson, and Robertson admitted that he had authority to do this. Meanwhile, Pearlman proceeded to arrange for the sale of such of the shares as Robertson desired to have sold and to settle the outstanding claims. On February 28, 1960, he went to see Robertson in prison once more and presented him with ten further bills totalling £4,609 odd. The largest of those was a bill for £3,517 odd in respect of "your affairs" which related almost entirely to the sale of the shares. The other bills were in connection with the various relatively small outstanding claims and in each case included charges for some work done before November, 1959. The total of the bills submitted by Pearlman was therefore nearly £9,000, of which only some £330 was for disbursements, the balance of some £8,600 being Pearlman's fees. Robertson refused to agree the bills presented on February 28 and changed his solicitors. On the advice of the new solicitors the bill of £3,517 for "your "affairs" was referred to the Law Society under proviso (*a*) to the Second Schedule to the Solicitors' Remuneration Order, 1883, and on November 14, 1960, the Law Society certified that a sum of £2,100 was a reasonable charge for the work done. Pearlman, who had meanwhile paid this bill out of funds of Robertson's in his hands, at once repaid him £1,417. On March 23, 1960, an order of course was made to tax the four largest of the remaining bills. These taxations were still pending. The other bills were relatively small and had been paid by Robertson.

On May 12, 1960, Robertson issued the present summons under the Solicitors Act, 1957, against Pearlman, asking that it might be referred to the taxing master to tax and settle the bill of fees and disbursements amounting to the sum of £3,805 10s. 4d. relating to the Bentley action. Robertson's solicitors did not realise that as the bill had been paid they had to show special circumstances to justify an order for taxation, and they did not file an affidavit in the first instance. At the first appointment before the master on June 1 he directed Robertson to file evidence in 14 days and Pearlman to file evidence in reply 14 days thereafter. On June 27 Robertson's affidavit was filed. On July 11, when his time for reply was about to expire, Pearlman asked Robertson's solicitors for a further 14 days in which to file his evidence, which they granted him. In fact, however, Pearlman did not put in his evidence before the long vacation. On August 6 Robertson was released from prison and went to Australia, and on August 12 he took out another originating summons [1960 P. 1909] against Pearlman asking for the handing over of certain documents and other relief. On August 24 Buckley J., as a term of making an order with regard to the documents, directed Robertson to give security in the sum of £400 for the costs of both summonses, and on September 8 this sum was paid into court. On October 11 Robertson's solicitors wrote to Pearlman reminding him that his evidence in answer in this summons had not been filed, and saying that if it was not filed within seven days they would have to restore the summons for hearing before the master. That letter appeared to have been unanswered, and on October 19 the solicitors wrote to Pearlman again saying that they had restored the summons for November 8. On November 1 Pearlman took out a summons asking for security for the costs of the present summons. That application was entirely misconceived since the sum of £400 paid in under the order of Buckley J. related to the costs of both proceedings. On November 4 Pearlman wrote to Robertson's solicitors stating that in his view it would be premature for him to file any affidavit in answer in this summons until the question of security was disposed of. On November 8, when the summons again came before him the master made a peremptory order that Pearlman file his affidavit within 10 days, and in fact he filed it on November 18. On December 12 Robertson filed an affidavit in reply and the evidence was closed. Meanwhile it had dawned on Robertson's solicitors that, having regard to the wording of the proviso to section 69 (2) of the Solicitors Act, 1957, they might be in difficulty if they did not get the summons heard before December 22. An application was accordingly made to Cross J. on December 9 to fix a day for a hearing of the summons that term, but the state of his list was such that he was unable to give a day nor could the parties get a day from any other judge. On December 21 the summons came again before the master, who adjourned it into court. Robertson did not dispute the amount of the disbursements.

Stewart Newcombe for the applicant. The court has a statutory jurisdiction given by section 69 of the Solicitors Act, 1957, to order taxation of the bill notwithstanding that twelve months have now expired since the date of payment under section 69 (2) (ii), since there are special circumstances giving jurisdiction and the application was made within twelve months: see Cordery on Solicitors, 4th ed. (1935), p. 408; Halsbury's Laws of England, 2nd ed. (1938), vol. 31, p. 211; *In re Boycott*,[2] *per* Bowen L.J.,[3] which, although the dissenting judgment, is now taken to be correct; *In re Norman*.[4] Among the special circumstances are the facts that the applicant was in prison at the time and was unable to take independent advice. Although he was subject to no pressure, the bill was high for the amount of work done and contained certain inaccuracies; further bills were delivered subsequently for work done before the date on which he agreed to pay the bill, and the bill should be looked at in the light of all the bills, of which there were 15 altogether.

Section 41 of the Solicitors Act, 1843, gave the court jurisdiction to order taxation of a bill provided that the application was made within twelve months of payment, but by section 66 (2) (ii) of the Solicitors Act, 1932, a consolidating Act, it was provided that no order might be made after the expiration of twelve months from payment of the bill, and this had been re-enacted by section 69 (2) (ii) of the Act of 1957. There is a presumption that a consolidating Act does not change the law and Parliament cannot have intended to make a radical change in the law. Section 69 (2) (ii) should read as though the words "on an "application made" were inserted after "made."

[2] (1885) 29 Ch.D. 571, C.A.

[3] Ibid. 578.

[4] (1886) 16 Q.B.D. 673; 2 T.L.R. 272, C.A.

Apart from statute, the court, in exercising disciplinary control over its officers, has an inherent jurisdiction to order taxation of the bill at any time: *Storer & Co.* v. *Johnson* [5]; *In re Park* [6]; Annual Practice, 1961, p. 3070. It is conceded that special circumstances which would have justified an order for taxation under the Act of 1957 if the matter had been heard before December 22, 1960, must be shown. The circumstances listed above are special circumstances for this purpose.

G. B. H. Dillon for the respondent solicitor. The court has no jurisdiction under section 69 (2) of the Act of 1957 to order taxation since at the date of any order more than twelve months would have expired from the payment of the bill. Section 69 of the Act of 1957 repeats section 66 of the Act of 1932. Before the Act of 1932 the matter was covered by section 41 of the Act of 1843 under which an order could have been made if the application for taxation had been commenced within twelve months after the payment of the bill. There is, therefore, a clear difference in wording between the Act of 1843 and that of 1932 and the latter has changed the law. Although the Act of 1932 was a consolidating Act and there is a presumption that such an Act does not change the law, that presumption must yield to plain words to the contrary: *Grey* v. *Inland Revenue Commissioners* [7] and *MacConnell* v. *Prill (E.) & Co. Ltd.*[8] If the result is to disclose a gap in the law, it is for Parliament and not for the courts to fill it: *Magor and St. Mellons Rural District Council* v. *Newport Borough Council.*[9]

So far as the inherent jurisdiction is concerned, that only applies where there is no statutory provision to the contrary: *Sutton* v. *Sears.*[10] Here there is a statutory prohibition on the making of an order for the taxation of a bill more than twelve months after it has been paid and the court cannot have inherent jurisdiction to do that which Parliament has prohibited. *Storer & Co.* v. *Johnson* [11] is distinguishable because there the court merely held that it had power to make an order which, although not specifically authorised, was in no way prohibited by the Act of 1843. The observations of Lord Halsbury L.C. must be read in that context. *In re Park* [12] is not relevant as it was merely a case of the court's ordinary jurisdiction over contested claims where a solicitor who had not been paid was claiming payment. *In re Harman & Son, Solicitors* [13] is against the court having had inherent jurisdiction while the Act of 1843 was in force to order taxation on an application made more than twelve months after a bill had been paid.

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[5] (1890) 15 App.Cas. 203, H.L.

[6] (1889) 41 Ch.D. 326, C.A.

[7] [1960] A.C. 1, 13; [1959] 3 W.L.R. 759; [1959] 3 All E.R. 603, H.L.

[8] [1916] 2 Ch. 57; 32 T.L.R. 509.

[9] [1952] A.C. 189; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839, H.L.

[10] [1960] 2 Q.B. 97, 102; [1959] 3 W.L.R. 791; [1959] 3 All E.R. 545.

[11] 15 App.Cas. 203.

[12] 41 Ch.D. 326.

Even if there is inherent jurisdiction no order will be made unless special circumstances have been shown. Here there are no special circumstances. The test is in the judgment of Bowen L.J. in *In re Boycott.*[14] The applicant here was subject to no pressure and approved and paid the bill without protest. By so doing he waived inquiry and he cannot now reopen the matter. Moreover, the Bentley action was a difficult action and the outcome was of paramount importance to the client. The factors justifying high charges for discretionary items were present here in a very high degree. [Reference was also made to *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*[15] and *Scheff* v. *Columbia Pictures Corporation Ltd.*[16]]

The subsequent bills relate to a different period of time and must stand or fall by themselves.

Stewart Newcombe replied.

Cur. adv. vult.

March 29. CROSS J. read the following judgment: This is a summons taken out under the Solicitors Act, 1957, by Robert Affleck Robertson against his former solicitor, Sidney Pearlman, asking for taxation of a bill of fees and disbursements amounting to £3,805 delivered to him by Pearlman on November 25, 1959, and paid by him on December 22, 1959. The relevant section of the Solicitors Act, 1957, is section 69. [His Lordship read section 69 (1) and (2) and continued:] This summons was taken out on May 12, 1960, which was within 12 months of the date of payment of the bill, but it has not come before the court for decision until after the expiry of the 12 months. The points which arise and have been argued before me are: (1) Has the court jurisdiction under the Act to order taxation of this bill having regard to the fact that more than 12 months have now passed since it was paid? (2) If not, has the court power under its inherent jurisdiction over solicitors as officers of the court to make an order dealing with these costs? (3) Assuming that there is jurisdiction under one or other head, ought an order to be made?

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[13] [1912] W.N. 111.

[14] 29 Ch.D. 571, 578.

[15] (1889) 60 L.T. 753.

[16] [1938] 4 All E.R. 318, C.A.

The facts of the case are as follows. [His Lordship stated the facts and continued:] It is not perhaps surprising in the circumstances that Robertson and his advisers suspected that Pearlman had realised earlier than they did that the court might have no jurisdiction to make an order under the Solicitors Act, 1957, if the summons was not heard before December 22, and that he had been playing for time. But, having heard Pearlman give evidence on the point, I am satisfied that the first time that he realised that there might be such a point was on December 8, when the applicant's advisers raised it before the master during an appointment on summons 1960 P. 1909.

I turn now to the points at issue and, first, the construction of the proviso in question. Section 69 of the Solicitors Act, 1957, is a repetition of section 66 of the Solicitors Act, 1932. That Act was expressed to be an Act to consolidate the Solicitors Acts, 1839 to 1928, and other enactments relating to solicitors of the Supreme Court. One of the Acts repealed was the Solicitors Act, 1843, section 37 of which dealt, inter alia, with applications for taxation of solicitors' bills 12 months after their delivery, or after a judgment had been recovered on them, in the following terms: "Provided always, that no such reference as aforesaid "shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained . . . "or after the expiration of 12 months after such bill shall have "been delivered . . . except under special circumstances, to be "proved to the satisfaction of the court or judge to whom the "application for such reference shall be made." Section 41 of the Act of 1843 dealt with applications for taxation of bills after payment as follows: "And be it enacted, that the payment of "any such bill as aforesaid shall in no case preclude the court "or judge to whom application shall be made from referring such "bill for taxation, if the special circumstances of the case shall "in the opinion of such court or judge appear to require the same, "upon such terms and conditions and subject to such directions "as to such court or judge shall seem right, provided the application for such reference be made within twelve calendar months "after payment."

It will be observed that in the case both of the delivery of a bill and of the payment of a bill the 12 months' period is 12 months before the application to tax is made, and not 12 months before the order on that application is made. Did the Act of

1932 make a change in this respect? If it did, I think that the change extended not only to the taxation of paid bills but also to the taxation of bills which have been delivered but not yet paid. The Act of 1932 was, as I have said, a consolidating Act, and there is a presumption that such an Act does not change the law although that presumption will yield to plain words to the contrary: see *per* Lord Simonds in *Grey* v. *Inland Revenue Commissioners.*[1] The presumption against any change is strengthened in this case by the character of the change which it is said has been made. So far as I can see, there is nothing whatever to be said in favour of making the relevant date the date of the order instead of the date of the application, and everything to be said against doing so. To make the date of the order the relevant date is to encourage an unscrupulous defendant to delay the proceedings and, as happened in this case, is liable to give rise to suspicions that the defendant is playing for time, even when he is not. Further, even if both sides have the point in mind and co-operate in pressing on with the case, they may both be defeated by the state of the list or the illness of a judge. It is altogether wrong that the rights of the parties should depend on accidents of this sort, but however sure I may be that Parliament did not intend the change, my duty is simply to construe the language of the Act. I have no power to rectify it, and with the best will in the world I cannot escape the conclusion that section 66 of the Act of 1932 contained an unintentional change in the law. To read in after the word "made" in proviso 2 the words "on an application made," which is what the plaintiff's counsel invited me to do, would, I think, be to rectify the Act, not to construe it. All that I can do on this branch of the case is to express the hope that the point may be considered by the appropriate authority, and that when opportunity offers the position as it was under the Act of 1843 may be restored.

I turn now to the question of the inherent jurisdiction. From the earliest times the various courts of law and equity exercised control over the attorneys or solicitors who practised in them. In time the profession of attorney and solicitor came to be regulated by statute but the inherent jurisdiction of the court over its officers continued to exist as a supplement to the statutory regulation. Thus, in 1806, in *Ex parte Arrowsmith*,[2] Lord Erskine L.C. held that the court had a general jurisdiction to order taxation of a solicitor's bill independently of the Act of 1729, which was the predecessor of the Act of 1843, and in *Storer & Co.* v. *Johnson*[3] the House of Lords held that though there was no power under the Act of 1843 to order taxation of part of a solicitor's bill, such an order could be made under the inherent jurisdiction.

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[1] [1960] A.C. 1, 13; [1959] 3 W.L.R. 759; [1959] 3 All E.R. 603, H.L.

[2] (1806) 13 Ves. 124.

Counsel for the solicitor, however, argues that though the court has power under its inherent jurisdiction to make orders for taxation which are not within the scope of the current provisions of the Solicitors Acts, section 41 of the Act of 1843 (which had no counterpart in the Act of 1729) prohibited the court from dealing in any way with a bill which had been paid twelve months before the application to tax was made. Similarly, he submits that since 1932 the court has had no power to deal in any way with a bill paid more than 12 months before the application to tax it comes before the court. I cannot accept that submission. In *Storer & Co.* v. *Johnson* Lord Halsbury L.C. said[4]: "I think it "is quite clear that the Solicitors Act did not deprive the court "of the jurisdiction which they always possessed to do justice in "the premises when dealing with one of their own officers, and "that they might therefore order that the costs should be taxed, "although not in terms of the Solicitors Act." It is true that the precise point was not before him, but I do not see why I should qualify his language and read section 41 as impliedly curtailing the inherent jurisdiction in any way. The presumption should, I think, be against any such curtailment. Further, it is to be remembered that to deal with a solicitor's costs under the inherent jurisdiction is not at all the same thing as to order a taxation of them under the Solicitors Act. In the first place, the one-sixth rule as to the costs of the taxation does not apply. Again some and not all the items in the bill can be dealt with. Finally, the standard applied will not necessarily be the same. In acting under the inherent jurisdiction the court could, I think, in a suitable case, order a "moderation" of the bill rather than a taxation of it.

The only authority to which counsel for the solicitor referred me as supporting his contention was *In re Harman & Son, Solicitors*,[5] but the question at issue in that case was whether or not a bill more than 12 months old had been paid. Eve J. decided that it had been and there may have been no ground for contending that there were any special circumstances which would justify the invocation of the inherent jurisdiction after the 12 months had expired.

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[3] (1890) 15 App.Cas. 203, H.L.

[4] Ibid. 206.

[5] [1912] W.N. 111.

On the footing that I have power to deal with this bill under the inherent jurisdiction, counsel for the plaintiff conceded that he had to show special circumstances such as would have justified me in making an order for taxation under the Act if the matter had come before me before December 22, 1960. On the other hand, counsel for the solicitor admitted that if there were such special circumstances in this case I should be justified in exercising the inherent jurisdiction, assuming it to exist, since neither party realised the effect of the proviso to section 69 until it was too late for the court to hear the case within the year, and his client had innocently caused considerable delay by failing to file his evidence in proper time.

It remains for me, therefore, to consider whether the plaintiff has shown the existence of special circumstances such as would have entitled him to an order for taxation under the Solicitors Act, 1957, if the case had been heard before December 22, 1960. At one time it was thought that the only circumstances which could justify an order to tax a paid bill were pressure accompanied with over-charges or over-charges so gross as to be evidence of fraud, but in *In re Norman*[6] the Court of Appeal rejected the idea that there were any hard and fast rules on the subject. That does not, of course, mean that a judge can properly send a paid bill for taxation without regard to the state of mind of the client when he paid it simply because he thinks it contains or may contain some over-charges. He must take into account the circumstances of the payment on the one hand and the size of the over-charges or possible over-charges on the other hand. Broadly speaking, I think it would be true to say that the more pressure or protest there was at the time of payment the smaller the over-charges need be to justify an order to tax, while conversely the less pressure or protest there was the larger the over-charges or possible over-charges must be.

Counsel for Pearlman argues that Robertson was subject to no pressure, that he paid the bill without any serious protest, and that the bill itself—though at first sight it may seem high—was really not unreasonable. The amount at stake was very large and the matter was of the utmost importance to the client. He was facing utter ruin and, largely through Pearlman's efforts, he emerged not only solvent but comparatively wealthy. The matter was very complex, and the fact that Robertson was in prison and that the other claimants to the shares were by no means favourably disposed towards him added to the difficulty of Pearlman's task in effecting a settlement of the action. All-in-all—it is said—a charge of 3,500 guineas cannot be said to be altogether out of the way in the circumstances.

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[6] (1886) 16 Q.B.D. 673; 2 T.L.R. 272, C.A.

I will deal first with the amount of the bill. I do not say that it is inconceivable that Pearlman might be able to justify it if it were taxed. But, after giving what I hope is due weight to everything that was argued in its defence, I consider that the bill is, to use the words of Bowen L.J. in *In re Boycott*,[7] "redolent of "over-charge." The action did not even reach the stage of discovery, and the pleadings do not suggest to me that the litigation was (as Chancery actions go) exceptionally complicated. This impression accords with the fact that Chancery counsel of standing wrote an opinion for 20 guineas. I recognise, of course, that a comparison between solicitor's charges and counsel's fees may be very unfair to the solicitor. A solicitor's overheads are far higher than those of counsel. Pearlman had all the labour of going through the raw material, digesting it, and setting out the relevant matter in his instructions. Again he had the arduous and very responsible task of negotiating the settlement in the light of the advice which he received. Obviously, the remuneration to which he was fairly entitled was many times greater than the fees charged by counsel. But all the same, making every allowance, I think that the discrepancy between 20 guineas and 3,500 guineas is not without significance. Yet again, if one tests the matter from the point of view of hours worked, one reaches the same conclusion. For his services as regards the bankruptcy petition, which he says was a matter of great importance and perplexity requiring exceptional care and skill, Pearlman charged £387 for 22 hours work, that is about £18 an hour. For the Bentley action in which his work in part covered the same ground, he charged £3,675 for 67 hours work, i.e., about £55 an hour. Finally, the fact that his bill "re your "affairs" was reduced by the Law Society from £3,517 to £2,100 shows that his idea of what constitutes reasonable remuneration for his services does not always accord with those of the governing body of his profession.

I am not, of course, deciding that this bill was too high. Possibly it could be justified. What I do say is that it is a bill which I should not be surprised to see substantially—even drastically—reduced on taxation. "Well, so be it," says counsel for Pearlman, "Robertson paid the bill without any real protest and

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[7] (1885) 29 Ch.D. 571, 582, C.A.

"without any pressure from Pearlman. By doing so he waived "once and for all any right to inquire into its propriety." There would be force in this argument if the Bentley action had been the only matter in which Pearlman was acting for Robertson. If Robertson's state of mind when he paid it had been: "Well, "this is a very heavy bill but I suppose I must pay it—after all, "Pearlman has served me very well and this will be an end of "the matter"—and if his change of mind was simply due to the fact that another solicitor later told him that the bill could and probably would be substantially reduced on taxation, it may be the size of the bill would not itself be sufficient to establish "special "circumstances." I have not, however, to decide that question, for Robertson's state of mind was quite different. He had paid the bankruptcy bill of about £500. He had received the Bentley bill of £3,800 odd and he expected further bills of, say, £1,000 for the comparatively small minor matters which still remained to be done. He did not judge the Bentley bill in isolation on its merits as a bill for Pearlman's services in the Bentley action. He viewed it as a step—a big step—in the build-up of the sum of about £5,000 which he expected to have to pay to Pearlman. What made him subsequently wish to have the bill taxed was not simply the fact that he had been told that it was too high, but the fact that Pearlman had meanwhile presented him with further bills for £4,609 and so shown that the total that he intended to extract from him was not £5,000 but nearly £10,000. It is true that in paying the Bentley bill Robertson did not tell Pearlman that he was paying it on the footing that the further bills were not to be more than about £1,000 or so. But what I am concerned with at this point is Robertson's state of mind, not Pearlman's. On the whole, having regard to the size of the bill and his state of mind when he paid it, I think that Robertson has established such "special circumstances" as would have justified an order for taxation of this fee of 3,500 guineas if the matter had come before me last term. I propose, therefore, to direct the taxation of that fee under the inherent jurisdiction. I shall reserve all questions of costs, both of this summons and of the taxation.

Direction accordingly.
Costs of summons and taxation reserved.

Solicitors: *Foyer, White & Prescott; Sidney Pearlman.*

M. G. T.

In re HOWARD'S WILL TRUSTS.
LEVIN AND OTHERS *v.* BRADLEY AND OTHERS.

1961
March 21,
22, 23, 29.

Wilberforce J.

[1960 H. No. 3503.]

Name and Arms Clause—Condition subsequent—Public policy—Uncertainty—Direction to "take use and bear" surname "upon all "occasions"—Forfeiture on refusal or neglect, or if person entitled should "discontinue" to use name—Direction applying to married women and their husbands—Whether void for uncertainty—Whether contrary to public policy.

Will—Construction—Acceleration—Forfeiture clause—Time of application—Life interest released to remainderman—"Under the limitations" herein—Name and arms clause.

Severability of Documents—Name and arms clause—Public policy—Partly contrary to public policy (post, p. 524).

Judicial Precedent—Public policy—Decision at first instance—Stare decisis.

By his will, dated February 19, 1930, a testator devised three freehold estates to his trustees on trust for his wife for life, and after her death for his daughter, his only child, for her life, with remainders over among his grandchildren. By clause 8 of his will the testator directed that every person other than his daughter who became entitled "under the limitations hereinbefore contained" as tenant for life or tenant in tail male or tail general to the possession or receipt of the rents and profits of the settled estates, and who did not at that time use and bear the surname and arms of Howard "shall within one year after becoming so entitled or (being an "infant) within one year after attaining the age of 21 years and "also every person . . . being the husband of a woman becoming so "entitled shall within one year after his marriage or within one "year after his wife becomes so entitled . . . take use and bear "and every other person becoming so entitled who already uses the "name of Howard shall continue to use and bear in all deeds and "writings which he or she shall sign and upon all occasions the "surname of Howard and . . . shall apply for and endeavour to "obtain the royal licence or take such other steps as may be "required to authorise the user and bearing of the said surname and "arms and further that in case any person or the husband of "any person becoming so entitled . . . should refuse or neglect "within the time aforesaid to take use and bear the same . . . "or . . . should discontinue to use and bear the same (except in "the case of a woman upon marriage) then . . . immediately after "the expiration of the said . . . year or immediately after such "discontinuance . . . the estate for life . . . [or] . . . the estate in "tail male or in tail general of that person shall absolutely determine" and the settled estates should devolve as though the person concerned being a tenant for life were dead, or being a tenant in tail were dead and without heirs.

The testator died on April 22, 1934, and his wife in 1941. His daughter died on January 5, 1960, at which date, in the events which had happened, the persons beneficially interested under the separate limitations of each estate in the will were respectively a man (the testator's grandson), a widow and a married woman (the testator's granddaughters). Between 1950 and 1958 the testator's daughter released part of her interest in two of the settled estates to the widow and the married woman, thus accelerating their interests. By January 5, 1961, none of those persons had taken any steps to comply with the direction in clause 8 of the will.

On a summons to determine whether clause 8 of the will was valid and binding, or whether it was void for uncertainty or as being contrary to public policy, and if it were binding, whether the term of one year after refusing or neglecting to assume the surname and arms began, as regarded the testator's granddaughters, on January 5, 1960, on the death of his daughter, or on the dates of the releases by her:—

Held, (1) that adopting the principle of reasonable construction, the clear meaning of the injunction to "take use and bear" the surname of Howard "on all occasions" was that the surname should be used on all occasions on which a surname would be used; and of "discontinue" that failure to use the surname on one such occasion would be a breach of the injunction occasioning a forfeiture, and that, accordingly, the clause was not void for uncertainty (post, pp. 519, 520).

In re Neeld [1960] Ch. 455; [1960] 2 W.L.R. 730; [1960] 2 All E.R. 33; *In re Drax* (1906) 22 T.L.R. 343 followed.

In re Wood's Will Trusts [1952] Ch. 406; [1952] 1 T.L.R. 670; [1952] 1 All E.R. 740; *In re Kersey* [1952] W.N. 541 distinguished.

(2) That in so far as it applied to women married at the date of its operation or their husbands, the clause was void as being contrary to public policy; but that otherwise it was not contrary to public policy and was binding (post, p. 524).

In re Neeld (supra) followed.

(3) That, as regards the testator's granddaughters, the term of one year did not begin until the death of the testator's daughter on January 5, 1960, for it was not until that date that they became "entitled under the limitations hereinbefore contained" (post, p. 525).

In re Petre's Settlement Trusts [1910] 1 Ch. 290 applied.

(4) That since the testator's widowed granddaughter and his grandson, had known of the existence of the clause, and had not complied with it within one year of the death of his daughter, they had neglected to act under it and that, accordingly, their interests were forfeited.

ADJOURNED SUMMONS.

By his will, dated February 19, 1930, the testator, Philip John Canning Howard, devised three freehold estates, the Corby estate, the Foxcote estate and the Middleton estate, the "settled estates," to his trustees on trust, subject to certain charges relating to the estate as a whole which ceased to be payable, for his wife for life, and after her death for his daughter, Lady Ursula Mary Lawson, the wife of Sir Henry Joseph Lawson, for life, with remainders over. Clause 8 of the will read: "I declare that every person (other "than Lady Lawson or a peer or peeress) who under the limitations hereinbefore contained becomes entitled as tenant for life "or as tenant in tail male or in tail general by purchase to the "possession or to the receipt of the rents and profits of my settled "estates or any part thereof and does not at the time of becoming "so entitled use and bear the surname and arms of Howard shall "within one year after becoming so entitled or (being an infant) "within one year after attaining the age of 21 years and also "every person (other than the said Sir Henry Joseph Lawson or "a peer) being the husband of a woman becoming so entitled "shall within one year after his marriage or within one year after "his wife becomes so entitled or if he be an infant then within "one year after attaining the age of 21 years (whichever of the "three last mentioned events last happens) unless in any case prevented by death take use and bear and every other person "becoming so entitled who already uses the name of Howard "shall continue to use and bear in all deeds and writings which "he or she shall sign and upon all occasions the surname of "Howard and every such person who shall also for the time "being be entitled to the possession or receipt of the rents and "profits of the Lawson family estates in the county of York and "elsewhere or upon whom the baronetcy held and enjoyed by the "said Sir Henry Joseph Lawson shall devolve in conjunction "with the surname of Lawson and so that the surname of "Howard shall immediately precede the surname of Lawson and "as to every other such person without any other surname "and shall also use the arms of Howard As to every such person who shall also for the time being be entitled to the "possession or the receipt of the rents and profits of the Lawson "family estates aforesaid or upon whom the said baronetcy held "and enjoyed by the said Sir Henry Joseph Lawson shall "devolve quartered with the Lawson family arms and as to every "other such person without any other arms and every such "person if not having already borne and used the surname and "arms of Howard shall apply for and endeavour to obtain the "royal licence or take such other steps as may be requisite to "authorise the user and bearing of the said surname and arms "and further that in case any person or the husband of any "person becoming so entitled (other than Lady Lawson and the "said Sir Henry Joseph Lawson and not being a peer or peeress) "and not having already taken or used and borne such surname and arms should refuse or neglect within the time aforesaid to take use and bear the same respectively or to take such "steps as aforesaid or if any person or the husband of any person "so entitled and using or bearing such surname and arms should "discontinue to use and bear the same (except in the case of a "woman upon marriage) then and in every such case immediately "after the expiration of the said term of one year or immediately after such discontinuance as aforesaid as the case may "be if the person who or whose husband shall so refuse or "neglect or discontinue as aforesaid shall be tenant for life the "estate for life of that person shall absolutely determine and if "the person who or whose husband shall so refuse neglect or "discontinue as aforesaid shall be tenant in tail male or in tail "general then the estate in tail male or in tail general of that "person shall absolutely determine and my settled estates shall "immediately go to the person next in remainder under the "limitations hereinbefore contained in the same manner as if in "the case of a person whose estate for life is so made to determine that person were dead or in the case of a person whose "estate in tail male or in tail general is so made to determine "that person were dead and there were a general failure of issue "of that person inheritable to that estate which is so made to "determine."

The testator died on April 22, 1934, and his will was proved on October 24, 1934. His widow died on May 22, 1941, and his daughter, who after the death of Sir Henry Joseph Lawson married one Hugh Levin, died on January 5, 1960. At the date of her death, in the events which had happened, the settled estates were held on the following trusts: The Corby estate was held on trust for William Howard Lawson, the younger son of Mrs. Levin, for life, with remainder to his son, John Philip Lawson, for life, with remainder (subject to defeasance in the event of issue being born to John Philip Lawson) to Hugh William Lawson, the second son of William Howard Lawson, in tail male. The Foxcote estate was held on trust for Mrs. Mary Catherine Bradley, the elder daughter of Mrs. Levin, who at the date of the testator's death was married to Geoffrey Bradley, who died on March 16, 1945, and, she having had no children, with remainder to Denis Gerard Waterkeyn, the son of Mrs. Aurea Clare Waterkeyn, the younger daughter of Mrs. Levin and who was also married at the date of the testator's death, for life, with remainder to his infant son, Francis Howard Waterkeyn, in tail male with remainder to him in tail general, with remainder to his infant sister, Catherine Anne Waterkeyn, in tail male with remainder over. By a deed of release and surrender dated November 1, 1960, Mrs. Aurea Clare Waterkeyn had released her contingent reversionary life interest in the Foxcote estate to the intent that the estate should devolve on the death of Mrs. Bradley as though she had predeceased Mrs. Bradley. The Middleton estate was held on trust for Mrs. Aurea Clare Waterkeyn for life with remainder to Denis Gerard Waterkeyn for life with remainder to Francis Howard Waterkeyn in tail male with remainders over.

In 1950 and 1952 Mrs. Levin had released parts of her interest in the Middleton estate, thus accelerating the interest of Mrs. Aurea Clare Waterkeyn, and in 1953 she had released part, and in 1958 a further part, of her interest in the Foxcote estate, thus accelerating the interest of Mrs. Bradley.

By a deed of family arrangement dated July 23, 1953, and made between Mrs. Levin, her elder son, Sir Ralph Henry Lawson, William Howard Lawson, Mrs. Aurea Clare Waterkeyn, her daughter, Mrs. Cecilia Rambaut, Denis Gerard Waterkeyn and Mrs. Bradley (all the adults then beneficially interested in any part of the settled estates), of the first part, and the trustees of the will of the second part, which recited that it was apprehended that clause 8 of the will was invalid, it was agreed that the will should be read and construed in all respects as if that clause were omitted therefrom.

Following the death of Mrs. Levin on January 5, 1960, none of the parties of the first part to the deed of family arrangement were anxious to change their names, nor were John Philip Lawson and Hugh William Lawson anxious to change their names or to take advantage of any forfeiture that their father might incur or might have incurred by refusing or neglecting to change his name. The husband of Mrs. Aurea Clare Waterkeyn, who had lived apart from his wife since 1932, had stated in about 1934 his unwillingness to change his name, and their son, Denis Gerard Waterkeyn, was also not anxious to change his name or to take advantage of any forfeiture that Mrs. Aurea Clare Waterkeyn or Mrs. Bradley might incur or which might have been incurred by his father or Mrs. Bradley refusing or neglecting to change their names.

On December 14, 1960, the trustees of the will took out a summons to determine whether clause 8 of the will was valid and binding on the defendants, Mrs. Bradley, Mrs. Aurea Clare Waterkeyn, William Howard Lawson, Denis Gerard Waterkeyn, John Philip Lawson, Hugh William Lawson, Catherine Anne Waterkeyn and Francis Howard Waterkeyn, or whether it was void for uncertainty or as being contrary to public policy; and if it were valid and binding, whether the term of one year after refusing or neglecting to assume the surname and arms commenced as regarded Mrs. Bradley and Mrs. Aurea Clare Waterkeyn (a) on the death of Mrs. Levin, or (b) as respected each part of the settled estate in which Mrs. Levin released her life interest, on the date of the releases.

D. C. Potter for the trustees of the will.

R. S. Lazarus Q.C. and *T. A. C. Burgess* for the adult defendants, the first to sixth defendants. Clause 8 of the will is not binding on the first to sixth defendants as it is void both for uncertainty and as being contrary to public policy. The positive injunction to "take use and bear" the surname of Howard "on "all occasions" is itself uncertain, since there must be occasions when the surname would not be required to be used, as, for example, when writing to a member of the family; as these occasions are incapable of definition, the occasions when a surname must be used must be equally uncertain. To construe the words "on all occasions" as referring to all occasions when a surname ought to be used, following *In re Drax*,[1] does not make their meaning more certain. The court must be able to see with certainty the act that will cause the condition subsequent to operate (*Clavering* v. *Ellison*[2]; *Clayton* v. *Ramsden*[3]), and this cannot be done unless the positive injunction is certain. Moreover, the corresponding forfeiture provision is equally uncertain. The primary meaning of "discontinuance" is the cessation of a habit or a settled course of action (see the Oxford English Dictionary), so that it would be impossible to say at any given moment that the use of the surname Howard had been discontinued. It would be wrong to hold that one isolated instance of non-user of the name would cause a forfeiture. [Reference was made to *In re Bouverie*[4]; *In re Wood's Will Trusts*[5]; *In re Lewis' Will*

[1] (1906) 22 T.L.R. 343.

[2] (1859) 7 H.L.C. 707.

[3] [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16, H.L.

[4] [1952] Ch. 400; [1952] 1 T.L.R. 355; [1952] 1 All E.R. 408.

[5] [1952] Ch. 406; [1952] 1 T.L.R. 670; [1952] 1 All E.R. 740.

Trust[6]; *In re Kersey*[7]; *In re Neeld*[8]; and to Key and Elphinstone's Precedents in Conveyancing, 15th ed. (1953), vol. 2, p. 784.] This argument does not apply to the Howard arms, for the occasions on which arms should be used are relatively few and can be determined with reasonable certainty. [Reference was also made to *Brown* v. *Burdett*.[9]]

The clause is contrary to public policy as under it a married woman and her husband can be compelled to change their names. It tends to produce an interference with the sanctity of marriage which the doctrine of public policy is designed to prevent: *In re Fry*[10]; *In re Lewis' Will Trust*[11]; *In re Kersey*[12]; *In re Harris' Will Trusts*.[13] The whole condition is void ab initio and severance is not permissible.

On the assumption that clause 8 is valid and binding, the testator's grandson and two granddaughters have not suffered a forfeiture. The term of one year did not begin to run as regarded Mrs. Bradley and Mrs. Waterkeyn until the death of Mrs. Levin, as it was only then that they became entitled "under the "limitations hereinbefore contained": see *In re Petre's Settlement Trusts*[14]; *In re Duncombe*[15]; *In re Hinckes*.[16] In any case, the reference in the will to "any part" of the settled estates denoted one of the three estates, Foxcote, Middleton and Corby. A beneficiary could not suffer a forfeiture until he had become entitled to the whole of one of these estates. The testator's grandson and granddaughters never refused to comply with the clause, and until the decision in *In re Neeld*[17] they acted reasonably in thinking that the clause was inoperative. They therefore did not "neglect" within the meaning of the clause, although neglect might have arisen once the decision in *In re Neeld*[17] was published on April 22, 1960: see *In re Hughes*.[18]

Mark Nesbitt for the infant defendants, the seventh and eighth defendants. The clause is not void either for uncertainty or as being contrary to public policy. On a reasonable construction it is clear and certain in meaning. The words "on all "occasions" add certainty to "use." "Discontinue" also is clear in meaning and does not mean to cease to use over a period: *In re Neeld*[19] and *In re Drax.*[20] It is accepted that one wilful breach will cause a forfeiture. The condition merely enjoins that when a surname is used the surname is to be Howard. There is, further, no doubt about the occasions when a surname is to be used and it is not a real objection that the court is unable to list those occasions: *In re Wilson's Will Trusts.*[21] The present clause is indistinguishable from Davidson's Precedents and Forms in Conveyancing, 3rd ed. (1860), vol. 1, p. 323.

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[6] [1951] W.N. 591; [1951] 2 T.L.R. 1032.

[7] [1952] W.N. 541.

[8] [1960] Ch. 455; [1960] 2 W.L.R. 730; [1960] 2 All E.R. 33.

[9] (1882) 21 Ch.D. 667.

[10] [1945] Ch. 348; 61 T.L.R. 449; [1945] 2 All E.R. 205.

[11] [1951] W.N. 591.

[12] [1952] W.N. 541.

[13] The Times, March 1, 1961.

[14] [1910] 1 Ch. 290.

[15] [1932] 1 Ch. 622, C.A.

[16] [1921] 1 Ch. 475.

[17] [1960] Ch. 455.

[18] [1943] Ch. 296; 59 T.L.R. 375; [1943] 2 All E.R. 269.

A clause requiring a married woman alone to change her name is quite different from one requiring her husband also to change his name; this latter type of condition is not contrary to public policy: *In re Fry*[22]; *In re Bouverie*[23]; *In re Lewis' Will Trust.*[24] This distinction was not taken in *In re Kersey*[25] or in *In re Harris' Will Trusts,*[26] and these authorities should not be followed. Neither type of condition satisfies the tests laid down in *Fender* v. *St. John Mildmay.*[27] The court should, if necessary, sever so as only to invalidate the clause as against married women and their husbands: *In re Neeld.*[28] The question is whether the court can find separate, distinct provisions not in wording but in application. Unlike many contracts, there would be no difficulty or uncertainty here.

Mrs. Bradley and Mrs. Waterkeyn forfeited all their interest in any of the three estates one year after they first became entitled to any part of the income of any estate; the three estates are treated as one for the purpose of possession. The words "under the limitations hereinbefore contained" are controlled by "my settled estates or any part thereof" so as to take them out of *In re Petre's Settlement Trusts*[29] and *In re Duncombe.*[30] The opening words of the clause relate to entitlement to possession and not to physical possession. There has been a mistake of law which amounts to neglect and refusal. *In re Hughes*[31] and *In re Quintin Dick*[32] are distinguishable.

R. S. Lazarus Q.C. replied.

Cur. adv. vult.

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[19] [1960] Ch. 455.

[20] 22 T.L.R. 343.

[21] [1950] W.N. 507; [1950] 2 All E.R. 955, 960, 963.

[22] [1945] Ch. 348.

[23] [1952] Ch. 400.

[24] [1951] W.N. 591.

[25] [1952] W.N. 541.

[26] The Times, March 1, 1961.

[27] [1938] A.C. 1, 13; 53 T.L.R. 885; [1937] 3 All E.R. 402, H.L.

[28] [1960] Ch. 455, 467.

[29] [1910] 1 Ch. 290.

[30] [1932] 1 Ch. 622.

[31] [1943] Ch. 296.

[32] [1926] Ch. 992; 42 T.L.R. 681.

March 29. WILBERFORCE J. read the following judgment: The name and arms clause whose validity is in question in this case is contained in the will of Philip John Canning Howard, who died on April 22, 1934.

The greater part of that will was directed to dispositions of certain landed property which was collectively referred to as "the "settled estates." [His Lordship stated the dispositions, as set out above, and continued:] These separate dispositions having been made of the three estates, clause 8 of the will contained a name and arms clause applicable to the settled estates generally requiring, briefly, any person (other than the testator's daughter) who should become entitled as tenant for life or tenant in tail to the settled estates, or any part thereof, and the husband of any woman so becoming entitled, to assume the name and arms of Howard, and to use and bear the same upon all occasions, with a provision that upon any discontinuance so to do the estate of the person concerned should immediately determine.

It is, of course, well known that the name Howard is one of considerable antiquity and repute in English history, and the same is true of the Howard arms. It was the absence of any male issue to inherit the name that, no doubt, prompted the testator's disposition.

The name and arms clause did not apply to the testator's daughter, and the first occasion for its operation arose on January 5, 1960, when she died. If the clause is valid and effective (and subject to a subsidiary point to be noticed later) a forfeiture occurred on January 5, 1961, of the interests of those persons who took the first life interests, namely, William Howard Lawson, Mary Catherine Bradley and Aurea Clare Waterkeyn.

There are two other matters of fact to be stated at this point. First, there were certain partial releases of the life interest of the testator's daughter in the Middleton and the Foxcote (but not the Corby) estates, so that, pro tanto, the interests of Mrs. Bradley and Mrs. Waterkeyn were accelerated. This gives rise to the subsidiary point, which is whether these releases brought the name and arms clause into immediate operation. Secondly, there was executed on July 23, 1953, between all the parties interested in the settled estates who were at that date adults, a deed of family arrangement in which, after reciting that it was apprehended that the name and arms clause was invalid, it was agreed that the will should be read as if the name and arms clause were omitted therefrom. In other words, the adult beneficiaries agreed among themselves not to take advantage of any forfeiture which might have occurred. Consequently (and perhaps also for other reasons) no step has been taken by any of the relevant persons, subsequently to January 5, 1960, to comply with the clause, and as regards some of them it is already too late for them to do so.

There are some general observations I should like to make before examining the clause in detail. Name and arms clauses have been in use, and examples of them can be found in books of conveyancing precedents, for a century at least, and, so far as reported cases go, no general objection was raised to them until after the World War of 1939–45, although, undoubtedly, opportunities for such objection arose. From 1945 onwards a wind of change of increasing force developed against them. Vaisey J. held such a clause void in 1945 (*In re Fry* [1]) on grounds, inter alia, of public policy, and followed this with two further decisions in 1951 (*In re Lewis' Will Trust* [2]) and 1952 (*In re Bouverie* [3]), the latter followed immediately by a decision of Wynn-Parry J. (*In re Wood's Will Trusts* [4]), in which the invalidity was based on uncertainty. Later in 1952 Danckwerts J. held (*In re Kersey* [5]) that a clause almost identical with that with which I am concerned was void for uncertainty, and also as being contrary to public policy, and described it as out of date and inconsistent with the spirit of the time. It is not surprising that the editors of Key and Elphinstone's Precedents in Conveyancing, 15th ed. (1953), vol. 2, p. 784, should, with some degree of defeatism, have recommended to their readers to abandon the attempt to construct a binding clause and to limit themselves to a provision having only precatory force.

So far the tide flows strongly in one direction, but in 1960 Cross J., again on a clause very similar to the present, held (*In re Neeld* [6]) that it was not void for uncertainty, and, although expressing his willingness to follow Danckwerts J. on the issue of public policy in similar circumstances, found that the particular clause in that case, being almost exclusively directed towards male persons, was not contrary to public policy. Finally, in the course of this year, Plowman J. followed Danckwerts J. in holding a shorter clause contrary to public policy, but stated that he would not have rejected it on grounds of uncertainty alone (*In re Harris' Will Trusts*[7]).

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[1] [1945] Ch. 348; 61 T.L.R. 449; [1945] 2 All E.R. 205.

[2] [1951] W.N. 591; [1951] 2 T.L.R. 1032.

[3] [1952] Ch. 400; [1952] 1 T.L.R. 355; [1952] 1 All E.R. 408.

[4] [1952] Ch. 406; [1952] 1 T.L.R. 670; [1952] 1 All E.R. 740.

[5] [1952] W.N. 541.

[6] [1960] Ch. 455; [1960] 2 W.L.R. 730; [1960] 2 All E.R. 33.

To this brief summary of the cases I should add that in 1955, after Upjohn J. had upheld a clause not unlike the present (*In re Murray*[8]), the Court of Appeal[9] rejected it on account of certain special difficulties inherent in its drafting, but did not express or indicate favour or disfavour of the trend of decisions given at first instance.

In this labyrinth it is obvious that it is not easy for a judge of first instance to find his way.

I will now consider the criticisms which have been made of the clause. It is attacked, first, on grounds of uncertainty. As to this line of objection I make two observations: first, it is apparent that the clause—as, indeed, the whole of this will—is drafted, not only professionally but by a skilled draftsman with knowledge of the precedents and of the decided cases. It differs little from the precedent given in Davidson's Precedents and Forms in Conveyancing, 2nd ed. (1864), vol. 4, p. 334, and I bear in mind the words of Lord Simonds in *Bromley* v. *Tryon*[10] on the attitude of the courts towards well-tried and established conveyancing precedents.

Secondly, I bear in mind that I am concerned with a condition subsequent, which may have the effect of shifting or divesting a vested estate, and that, for the condition to be effective, it must be expressed with sufficient precision and distinctness to enable the court and (accepting Lord Romer's addition in *Sifton* v. *Sifton*[11]) the parties, to see from the beginning what it is that must be done to avoid or to bring about a termination of the relevant interest. It is right to look at the clause carefully and even critically, but I do not accept any suggestion that it should be examined with hostility, and I am inclined to think that sometimes an excessive degree of ingenuity has been deployed in attacking similar clauses. I accept the principle of reasonable construction adopted by Cross J. in *In re Neeld*[12] with a view to seeing whether some real, not fanciful, objection through lack of precision or distinctness exists. I think that the same approach, also involving a refusal to be intimidated by possible difficulties of application, was adopted by both the Court of Appeal[13] and the House of Lords[14] in *Bromley* v. *Tryon.*

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[7] The Times, March 1, 1961.

[8] Unreported.

[9] [1955] Ch. 69; [1954] 3 W.L.R. 521; [1954] 3 All E.R. 129, C.A.

[10] [1952] A.C. 265, 274–275; [1951] 2 T.L.R. 1119; [1951] 2 All E.R. 1058, H.L.

[11] [1938] A.C. 656, 675; 54 T.L.R. 969; [1938] 3 All E.R. 435, P.C.

[12] [1960] Ch. 455, 468.

Turning now to detail, the main criticism was directed against the word "discontinue." It was said that this word indicates the cessation of a habit, or of a settled course of action, and that it is impossible to say what degree of cessation, or for how long, is necessary to terminate the interest. Apart from authority, I should not be willing to accept this argument. The forfeiture provision follows, and would normally represent the counterpart of, the preceding portion of the clause which contains the positive injunction to take and use the name and arms. The two should, if possible, be construed together. The positive injunction is "take use and bear," and, in the case of a person who already uses the name of Howard, to "continue to use and bear "in all deeds and writings which he or she shall sign and upon all "occasions the surname of Howard."

The meaning of this injunction appears to me to be clear and stringent. The name is to be used on all occasions, and one case of failure to use would be a breach of it. To this the forfeiture clause provides a corresponding sequel; the words used are "in case any person . . . should discontinue to use and bear the "same," and these words, in my judgment, naturally and aptly mean that one case of failure brings a forfeiture about—a person who fails to use on one occasion evidently does not continue to use on all occasions. The words do not naturally or aptly suggest that before a forfeiture occurs there must be a period of cessation. The conception of a single, once-for-all breach, is, to my mind, strengthened by the following words "then and in every such "case immediately after the expiration of the said term of one "year, or immediately after such discontinuance as aforesaid" the estate shall absolutely determine. I find, then, that the word "discontinue" is, in its context, certain and clear.

But attack was also made upon the very words to which I have already referred as being, to my mind, significant, namely, "upon all occasions." It was said that these words are themselves uncertain, because there must be occasions when the surname is not used or required to be used, such as when writing to a member of the family, and these latter occasions being incapable of definition, the compulsory occasions must equally be uncertain. I do not find this argument impressive. The words, to me, appear, clearly enough, to refer to all occasions—and only those occasions on which a surname is used—to all " surname " occasions " and not to " Christian name occasions " or " nick- " name occasions," or, one might add, " pseudonym occasions ": so to interpret the words appears to me to fall well within the limits of careful and critical interpretation which the law requires, and so interpreted the words present no difficulty. On this approach to the clause I therefore find it lacking in destructive uncertainty.

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[13] [1950] W.N. 507; [1950] 2 All E.R. 955, C.A.

[14] [1952] A.C. 265.

But there are authorities to be considered. In *In re Lewis' Will Trust* [15] the word was " disuse," and Vaisey J. read this as referable, not so much to an identifiable act performed at one moment, as to a continuous process, the beginning of which might be very difficult to identify. He added [16]: " This word " does not appear to me to have the same meaning as ' discon- " ' tinue the use of,' a phrase which seems to indicate an overt " act, the happening of which can be identified."

In *In re Bouverie* [17] the word was again " disuse," but Vaisey J. expressed second thoughts about the words " to discon- " tinue," saying [18]: " Although . . . the word ' discontinue ' is " probably in not much better case, I thought at one time that " it was more descriptive of a single act than the word ' disuse.' " I am, however, not at all certain that the word ' discontinue ' is " not open to the same objection as the word ' disuse,' but I am " not going to say anything about that, because that is not the " word which is in question here."

These second thoughts were made the basis of the decision in *In re Wood's Will Trusts*,[19] where the positive injunction was to assume and use the surname and arms either alone or together with his or her own surname and arms, and Wynn-Parry J. then held [19] " that the clause was void for uncertainty, as the phrase " ' discontinue to bear and use ' was indistinguishable from the " word ' disuse ' . . ."

The word " discontinue " again figures in *In re Kersey*,[20] and though the report is not a full one, it is clear that Danckwerts J. had cited to him, and relied on, *In re Wood's Will Trusts*.[21]

In *In re Neeld* [22] there were two names and arms clauses, one relating to the name Inigo-Jones and one relating to the name Neeld. The Neeld clause had in it the word " discontinue," and also, in the positive injunction, the words " upon all occasions."

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[15] [1951] W.N. 591.
[16] Ibid. 592.
[17] [1952] Ch. 400.
[18] Ibid. 405.
[19] [1952] Ch. 406.
[20] [1952] W.N. 541.
[21] [1952] Ch. 406.
[22] [1960] Ch. 455, 466–467.

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Cross J. treated the addition of these words as decisive: he held that " discontinue to use " obviously referred back to the earlier phrase and meant " discontinue to use on all occasions." Not only was this his opinion, but he found support for it in *In re Drax*,[23] where Swinfen Eady J. held that " upon all other " occasions " referred to all occasions when a surname is ordinarily used.

I would only add to these modern decisions *In re Cornwallis*,[24] where the word " discontinue " was used followed by the words " for six calendar months," thus clearly, by the context, indicating a cessation of a habit.

In these circumstances, it is clear that I have ample support—without myself importing any unduly fine distinctions based on the different wordings used—for the interpretation which, prima facie, appeals to me, and for holding that the word " discontinue " may bear a different meaning in different contexts. I propose to align myself on this point with Cross J.[25] and Swinfen Eady J.,[26] whose reasoning seems to me entirely relevant to this clause, and to hold that the clause is not void for uncertainty.

I now pass to the issue of public policy, and here I think it convenient, first, to consider the state of the authorities directly bearing on name and arms clauses. In the first place, in spite of the long history of these clauses, it was never, so far as I know, suggested, still less decided, that they were contrary to public policy until the decision of Vaisey J. in *In re Fry*[27] in 1945, where he had occasion to consider a clause which applied to all persons becoming entitled, not to a life interest or an estate tail, but to an absolute interest, and whether they were male or female. It did not apply to the husbands of married women. The clause was fatally defective in other respects, but Vaisey J. also held it was void as being against public policy. After stating that he did so with hesitation, and that there might be cases in which it could be applied to a woman with " absolute propriety," he held that[28] " the use of different surnames by a man and " his wife cannot fail to be productive of many embarrassments " and inconveniences, not only to themselves, their children and " relatives, but to their friends and acquaintances, and indeed to " society generally." He referred to the clause as operating " by " the coercive and quasi-punitive method of a defeasance," and then said: " The precedent books show that the right form of a

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[23] (1906) 22 T.L.R. 343.
[24] (1886) 32 Ch.D. 388.
[25] [1960] Ch. 455.
[26] 22 T.L.R. 343.
[27] [1945] Ch. 348.
[28] Ibid. 354.

" name-clause where the beneficiary is or may become a married " woman is to place the obligation not upon her alone but upon " her husband as well."

From these citations it is obvious that the decision in *In re Fry*,[29] so far from supporting a contention adverse to the present clause, goes some distance the other way, in view of the description of Vaisey J.[30] of a clause like the present as " the right " form of a name clause." The objection which he felt in that case, at any rate, was based on a degree of embarrassment extending beyond the persons immediately affected by the condition and reaching the public at large. In *In re Lewis' Will Trust*[31] Vaisey J. followed this decision in a case where the person immediately concerned was an unmarried woman, but said that he did so " not without hesitation."

There followed the decision of Danckwerts J. in *In re Kersey*[32] in 1952, which involved a clause identical (I think) with the present. In particular it sought (as Vaisey J. said that it properly should) to impose the obligation on the husband of a married woman. The case is only briefly reported in the Weekly Notes, and there Danckwerts J. is reported as saying it was very undesirable that a wife should have to bring pressure upon her husband to change his name in order that she might not be deprived of an estate to which she had succeeded, and that he could not conceive anything more likely to cause differences between husband and wife than a clause containing a provision of this character. It illustrated the fatuity of trying to impose obligations of this sort which were out of date and inconsistent with the spirit of the times.

From this passage I understand the sole ground upon which the clause was held to be contrary to public policy to have been that differences would be caused between husband and wife. The reference to the clause being out of date and inconvenient with the spirit of the times was not, as I read it, to provide an additional basis of invalidity. It has never been the function of the judges on grounds of public policy to excise anachronistic practices from conveyancing (or surely they would long before their statutory abolition have rid the law of the restraint on anticipation), and I take the words of Danckwerts J. as of a descriptive character, corresponding to the adjective used by Lord Mansfield C.J. in *Gulliver* v. *Ashby*.[33]

[29] [1945] Ch. 348.
[30] Ibid. 354.
[31] [1951] W.N. 591.
[32] [1952] W.N. 541.
[33] (1766) 4 Burr. 1930, 1941.

In re Kersey[32] was adverted to in *In re Neeld*,[34] when Cross J. said that he would have followed the decision had it been applicable; in fact, he distinguished it and it has recently been followed by Plowman J. in *In re Harris' Will Trusts*.[35]

The current of authority, then, is not inconsiderable and is all one way, and I have to consider whether I am justified in resisting it. I say "resisting" advisedly, because before me the whole issue of public policy was fully argued on its merits, and, speaking for myself, forceful and lucid though Mr. Lazarus's argument was, I found it, though possibly compelling, to carry less than perfect conviction. To hold such a clause as, from the public point of view, comparatively innocuous may well, I recognise depend, just as much as a finding against it, upon the idiosyncratic inferences of one judicial mind (I adapt from Lord Atkin's famous opinion in *Fender* v. *St. John Mildmay*[36]). But, nevertheless, search as I may, I cannot find either that the act required to be done (the assumption of the name and arms of Howard) is a harmful act, or that the condition may have harmful tendencies. I apply the test suggested by Lord Atkin[37] (and in passing I should say that the relevance of the tests, which are applied to contracts, to conditions is established by *Egerton* v. *Brownlow*[38] and the use of that case in *Fender's* case[39]): would the condition "in a majority of cases, or at any rate in a considerable number of cases" expose the parties "to a real temptation" such that it is likely that they will yield to it: is there likely to be a general tendency to do wrong?

To answer these questions in the affirmative involves two steps, either of which I would be reluctant to take. The first involves assuming that in a decision on matters which, after all, involve the interests of both spouses (since both are interested in the wife succeeding to the estate, and both are concerned with a change of name) the normal give-and-take of married life is unable, in a significant number of cases, adequately to arrive at an agreement. The second involves assuming that, if a difference of opinion, or even a disagreement, between the spouses is caused, that is likely to assume the dimensions of an evil which it is the public policy of the law to prevent. If such a doctrine to this effect were to prevail, it is difficult to see where it would stop:

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[32] [1952] W.N. 541.

[34] [1960] Ch. 455, 467.

[35] The Times, March 1, 1961.

[36] [1938] A.C. 1, 12; 53 T.L.R. 885; [1937] 3 All E.R. 402, H.L.

[37] [1938] A.C. 1, 13.

[38] (1853) 1 H.L.C. 1, H.L.

[39] [1938] A.C. 1, 13.

would a condition as to residence or religion (attached to a gift of property) be similarly treated? If not, how can the court compare a man's attachment to his name with his attachment to his house or to his religion? I even seem to detect some inconsistency between, on the one hand, the proposition that a testator's wish to continue his name is silly and anachronistic and ought to be rejected, and, on the other hand, the argument that a husband's reluctance to change his name for his wife's fortune is normal and ought to be respected. Be that as it may, just as pacta sunt servanda, so is the preservation of liberty, and in England liberty has always, happily, included eccentricity of testamentary disposition, an important objective of public policy, and I have not been persuaded that I could find here a contrary objective of equal or comparable weight.

In this, however, I am, as the recent cases show, speaking for myself, and it is evidently undesirable that on a subject so much a matter of appreciation different judges of the same Division should speak with different voices. (The risk of their doing so is, of course, one of the main arguments against applying considerations of public policy to any but the clearest cases.) There is a series of decisions one way and none, apart from two dicta of Vaisey J. in *In re Fry*,[40] the other way. These decisions may well have been acted upon—I have already noted the warning of the editors of Key and Elphinstone—and they have been acted upon by the beneficiaries in the present case as the recital in the deed of family arrangement, executed shortly after *In re Kersey*,[41] shows. The principle stare decisis seems to me to apply in full force in such a situation, and all the more since the clause here is identical with the clause in *In re Kersey*[42]; and I have come to the conclusion that I ought to follow the precedents.

How far, then, do the decisions go? In my judgment they go no further than to declare the clause void in so far as it affects married women. *In re Fry*,[43] *In re Kersey*[44] and *In re Harris' Will Trusts*[45] were all concerned with married women, and the ratio decidendi of *In re Kersey*[46] is applicable to married women alone. I see no reason to apply it to single women or to men.

The only cited case in which the principle has been applied to unmarried women is *In re Lewis' Will Trust*,[47] where, as I have

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[40] [1945] Ch. 348.
[41] [1952] W.N. 541.
[42] Ibid.
[43] [1945] Ch. 348.
[44] [1952] W.N. 541.
[45] The Times, March 1, 1961.
[46] [1952] W.N. 541.
[47] [1951] W.N. 591.

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said, Vaisey J. followed his own decision in *In re Fry*,[48] not without hesitation, but gave no additional reasons for applying that case to unmarried women.

It has been argued (on the analogy of covenants in restraint of trade) that I cannot sever the condition; that it is either wholly good or wholly bad. But I do not think that the analogy is a true one. In covenants in restraint of trade the court is faced, ex hypothesi, with a single covenant in consideration of which some other promise has been made. To sever the covenant would be to change the consideration and to alter the parties' bargain. In this will, the testator has attempted to apply the condition to men, single women and to married women, and I see no reason why, because it is void for a special reason as to married women, it should be void as to the others—any more than if a testator sought to apply a restraint on anticipation to every person, male or female, married or unmarried, interested under his will. In this case, moreover, the three separate estates were separately limited, the tenant for life at the relevant date being respectively a man, a widow and a married woman, and it seems to me that clause 8 should be separately and individually applied to each case. I am much assisted in reaching this conclusion by the fact that a similar approach was adopted by Cross J. in *In re Neeld*,[49] where, distinguishing *In re Kersey*,[50] he said[51]: " here the beneficiary who is immediately affected is the first defendant, Ralph " Christopher Inigo-Jones, and it is only in very improbable and " remote contingencies that any female can possibly be affected " at all. I do not think that the fact that a clause may be " invalid so far as it applies to married women and their husbands " is any sufficient reason for holding it totally void even as " applied to males or spinsters." With respect, I adopt this passage, and I would add widows to the latter class.

I must now deal with the subsidiary point which arose from the circumstances that the testator's daughter released her life interest in parts of the Middleton and Foxcote estates before her death. The question is whether, as regards the portion included in the releases, the name and arms clause operated immediately on the release, or whether it only operated when the life tenant died. This depends upon the true construction of clause 8.

That clause commences in this way: " I declare that every " person (other than Lady Lawson or a peer or peeress) who under

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[48] [1945] Ch. 348.

[49] [1960] Ch. 455, 467.

[50] [1952] W.N. 541.

[51] [1960] Ch. 455, 467.

" the limitations hereinbefore contained becomes entitled as " tenant for life or as tenant in tail male or in tail general by " purchase to the possession or to the receipt of the rents and " profits of my settled estates or any part thereof and does not " at the time of becoming so entitled use and bear the surname " and arms of Howard . . ."

The first argument was directed to the words " under the " limitations hereinbefore contained," and it was said that the granddaughters did not become so entitled; they became entitled under the releases. A similar point arose in *In re Petre's Settlement Trusts*,[52] where the reverse situation occurred, the reversioner assigned to the tenant for life in possession. Joyce J., however, considered both cases and said [53] that the words " entitled to the actual possession . . . under the limitations of " the . . . settlement " meant " entitled to such possession, " looking to the terms of the settlement, and not regarding any- " thing else." The word " actual " does not appear in this present will, but that seems to me immaterial, and otherwise the decision is relevant and helpful.

It was followed in *In re Duncombe*,[54] where the phrase was " in the actual possession or (construed as ' that is to say ') " entitled to the receipt of rents and profits of . . . " Romer L.J. relied [55] on the absence of some words as " under the limitations " of " or " under or by virtue of " the settlement to distinguish *In re Petre* [56] (which on the facts he appeared to accept), and to show that " actual possession," not " entitlement," was intended.

In my judgment the words in clause 8, " under the limitations " hereinbefore contained," bring the case under the principle stated in *In re Petre*,[56] with the result that release, total or partial, by way of acceleration does not bring the clause into operation. I should add that the words " or any part thereof " appear to me to relate to the three separate estates which are compendiously dealt with in this clause and do not contemplate a case of partial release. Accordingly, I hold that the name and arms clause did not begin to operate until the death of the testator's daughter on January 5, 1960.

One other point should be mentioned. It was suggested that the forfeiture provision had never operated, because no beneficiary had " refused or neglected " to assume the name and arms.

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[52] [1910] 1 Ch. 290.

[53] Ibid. 296.

[54] [1932] 1 Ch. 622, C.A.

[55] Ibid. 641.

[56] [1910] 1 Ch. 290.

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"Neglect," it was said, presupposes knowledge, actual or constructive, of a duty, and the parties did not know, at any rate until after the judgment of Cross J. in *In re Neeld*,[57] that they had a duty to comply with the clause. I do not accept this. The beneficiaries were clearly aware of the existence of the clause, and, acting advisedly, they did not comply with it. Such mistake as they made was purely a mistake of law, and they have clearly neglected to act under the clause.

I therefore decide: (1) That the clause is not void for uncertainty; (2) that the clause is void as contrary to public policy in so far as it purports to affect married women or their husbands, but no further; (3) that the effective date on which clause 8 began to operate was the death of the testator's daughter on January 5, 1960, and declarations will be made accordingly.

Declarations accordingly.
Costs to be paid out of the settled estates in proportion to their value.

Solicitors: *Blount, Petre & Co.*

M. G. T.

[57] [1960] Ch. 455.

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May 18, 19.

Buckley J.

In re ASPINALL, DECD.
ASPINALL *v.* ASPINALL AND ANOTHER.

[1960 A. No. 3326.]

Capital or Income—Administration or trust—Rent—Rent payable on quarter day—Death of landlord on quarter day—Rent payable in arrears—Rent in advance paid prior to death of landlord—Whether rents received capital or income—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *s.* 2.

Landlord and Tenant—Rent—When payable—Term continuing until end of date fixed for payment—Time of maturing when tenants' liability to pay—Moment of accrual of costs of action to recover rent.

Time, Computation of—Rent—Payable on quarter day—Death of tenant on quarter day—Whether payable before or after death.

By his will, dated September 30, 1954, a testator directed his executor to hold his residuary estate on trust to pay the income to his wife during her life and thereafter for his son absolutely. The testator died at 8.30 a.m. on December 25, 1954, and his will was proved on January 13, 1955. At the date of his death he owned certain leasehold premises which were subject to sub-leases under which certain rents were payable to him in advance and certain rents in arrears on the usual quarter days. Rent due in advance to the testator on November 22, 1954, under a sub-tenancy agreement was paid to him in his lifetime.

On a summons by the son to determine whether, by reason of the death of the testator on December 25, 1954, the sums received by him in his lifetime or by his executor after his death should be treated as capital or as income, or should be apportioned:—

Held, (1) that rent was not finally due until the end of the day fixed for the payment if the term continued until the end of that day, so that the tenants' liability to pay the rents due on December 25 did not completely mature until the last moment of that day, that was, until after the testator's death. No cause of action to recover those rents, therefore, formed part of the testator's estate at the moment of his death, and the rents eventually received, being received in respect of a right which matured after his death, ought to be income, save that, as regards the rents payable in advance, the rent for the one day, December 25, 1954, and as regards the rent payable in arrear, all but that day's rent should be treated as capital under section 2 of the Apportionment Act, 1870, since they accrued after the testator died.

Strafford v. *Wentworth* (1720) Prec. Ch. 555 applied.

(2) That the Apportionment Act, 1870, did not apply to the rent which accrued before the death of the testator, so that the rent due on November 22, 1954, fell to be treated wholly as capital.

Ellis v. *Rowbotham* [1900] 1 Q.B. 740; 16 T.L.R. 258, C.A. applied.

ADJOURNED SUMMONS.

By his will dated September 30, 1954, the testator, Robert Stivala Aspinall, directed his executor and trustee to hold his residuary estate on trust to pay the income to his wife Cecilia Mary Aspinall, the first defendant, for life and after her death for his son by an earlier marriage, Robert James Clement Aspinall, the plaintiff, absolutely. The testator died at about 8.30 a.m. on December 25, 1954; his will was proved on January 13, 1955.

At the date of his death the testator was the owner of leasehold premises, No. 55 Cadogan Place, London, of which there were three sub-leases or sub-tenancy agreements current in respect of three separate parts of the property. The ground floor was the subject-matter of a sub-lease dated July 15, 1954, for seven years from June 24, 1954, at an annual rent of £320 payable quarterly in advance on the usual quarter-days and an additional rent of £80 a year, also payable quarterly in advance on the usual quarter-days, for certain services provided by the testator. The first and second floors were the subject-matter

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of a sub-tenancy agreement dated November 22, 1954, under which they were let for a period from November 22, 1954, to March 31, 1955, at a total rent of £251 11s. payable in advance in two equal instalments of £125 15s. 6d., the first payable on November 22, 1954, and the second on January 24, 1955; in this case also there was an additional rent amounting to £38 14s. for the whole of the period of the tenancy payable by two equal instalments of £19 7s. on November 22 and January 24. The third and fourth floors were the subject-matter of a sub-lease dated December 11, 1951, for 21 years from December 25, 1951, at a rent of £285 a year, payable by equal quarterly instalments in advance on the usual quarter-days, and an additional annual rent of £136 10s. for services, also payable in advance by quarterly instalments on the usual quarter-days. The testator also owned another leasehold property, No. 60 Cadogan Lane, at the rear of the house, which was subject to an underlease dated February 27, 1952, for a term of 43¾ years less ten days from December 28, 1951, at a yearly rent of £50 payable by equal instalments in arrear on the usual quarter-days.

On the date of the testator's death there were thus due to him instalments of rent for the ground, third and fourth floors of No. 55 Cadogan Place and for No. 60 Cadogan Lane, while rent due on November 22, 1954, for the first and second floors of No. 55 Cadogan Place had been paid to him in his lifetime.

The son took out a summons to determine whether, by reason of the testator's death on December 25, 1954, the sums received by the testator during his lifetime (question 1 (d) of the summons) or after his death by his executor and trustee (question 1 (a), (b) and (c)) on account of the rents ought to be treated wholly as capital or wholly as income or partly as capital and partly as income of the residuary estate and if so in what proportions.

Andrew Goodall for the plaintiff. Rent is due at the earliest moment of the day appointed for payment: Foa on Landlord and Tenant, 8th ed. (1957), p. 104, and *Dibble* v. *Bowater.*[1] It is conceded that it is not legally recoverable until the next day, but the mere circumstance that the tenant might or might not pay the rent on the day appointed for payment before the death of the testator ought to be irrelevant as between those interested in the capital and income of the landlord's estate. It is irrelevant because the law pays no attention to fractions of a day (*Lester* v. *Garland*[2]), and therefore the testator must be taken to have lived throughout December 25, 1954, and to have died at midnight of that day; thus the rents falling due on that day became due from the earliest moment of that day and so belonged to him for 24 hours before his death and are a capital asset of his estate. Further, since all the rents in question accrued before the testator died, this is not a case for the application of the Apportionment Act, 1870: *Ellis* v. *Rowbotham.*[3]

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[1] (1853) 2 E. & B. 564.

J. H. Hames for the first defendant. There is no general rule compelling the court to ignore the time of a testator's death, but at most there are certain occasions when, on the balance of convenience, the court will ignore fractions of a day. *Lester* v. *Garland*[4] merely decided that when time from a particular period is allowed to a party to do any act, the first day is not to be reckoned. Even if there were such a rule, the court would not apply it in this case, for evidence of the time of death would be admitted: *Combe* v. *Pitt*[5]; *Atkinson* v. *Bradford Third Equitable Benefit Building Society*[6]; *In re North, Ex parte Hasluck*[7]; *Mulligan's* case, referred to in Tristram & Coote's Probate Practice, 21st ed. (1960), p. 218; *Doe* d. *Wheeldon* v. *Paul.*[8]

As regards the payment of rent, time may be divided into four periods. The first period relates to a payment which is made before the rent is made payable under the lease; in such case the tenant does not discharge his obligation to pay rent, and if the landlord should assign his interest in the land, without parting with the rent which has been paid in advance, the assignee can sue the tenant for the rent, though, of course, the tenant can recover the same from his former landlord. Such a period of time comes to an end on the last moment of the day before rent is made payable under the lease. The second period of time is the period when the rent is payable in the sense that a payment during that period is a valid discharge of the legal obligation to pay rent; this period starts from the first moment of the day when the rent is payable and ends on the last moment of that day. The third period of time is one which lasts merely for a moment; it is the period in which the right to the rent crystallises, and it arises at the last moment of time which the tenant has for making his payment, that is to say, on the last moment of the day on which rent is made payable. The fourth period is the period when the rent is in arrears, and arises immediately after the last moment of the day on which the rent is made payable: *William Clun's* case.[9]

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[2] (1808) 15 Ves. 248, 257.

[3] [1900] 1 Q.B. 740; 16 T.L.R. 258, C.A.

[4] 15 Ves. 248.

[5] (1763) 3 Burr. 1423.

[6] (1890) 25 Q.B.D. 377, C.A.

[7] [1895] 2 Q.B. 264; 11 T.L.R. 417, C.A.

[8] (1829) 3 C. & P. 613.

The right to the rent due on Christmas Day, 1954, accrued at midnight on that day. That this is so is borne out by a number of old cases decided before the passing of the 1925 property legislation. A tenant for life could grant a lease pursuant to the power granted to him under the settlement or pursuant to his interest (or estate) in the property. In the latter case the lease would determine on his death. It has been held that where the tenant for life died on the day when rent was payable and the lease was granted pursuant to a power in that behalf, the rent formed part of the settlement, but when it was granted pursuant to his estate, it belonged to him because the term ended at the time of his death: see *Norris* v. *Harrison*[10]; *Duppa* v. *Mayo*[11]; *Cutting* v. *Derby*[12]; *Lord Rockingham* v. *Penrice*[13]; *Strafford* v. *Wentworth*.[14]

It is conceded that to the extent of one day there should be an apportionment, and that as regards the rent payable in advance one day's rent, and as regards the rent payable in arrear all but one day's rent, should be treated as having accrued in the testator's lifetime; the remainder as having accrued since.

Oliver R. Smith for the second defendant, the executor.

Andrew Goodall replied.

BUCKLEY J. This case raises a short and academically interesting point which has been very well argued before me, but the amount of money involved is small and I cannot help regretting that the parties, who are stepmother and stepson, were not able to dispose of the matter by an amicable agreement.

[His Lordship stated the facts as set out above and continued:] The plaintiff, who is interested in the capital of the residuary estate of the testator in remainder expectant on his stepmother's death, contends that the rents which fell due on the day on which the testator died became due from the earliest moment of that day, that because the law pays no attention to fractions of a day, the testator must be taken to have lived throughout that day and to have died at midnight on December 25, 1954; and that therefore the rents which fell due on December 25, 1954, belonged to the testator for 24 hours before his death and are to be regarded as a capital asset of his estate. He relies on *Dibble* v. *Bowater*,[1] decided under section 1 of the Rent Act, 1737 (11 Geo. 2, c. 19), which related to the fraudulent removal of goods by a tenant in order to avoid distress. There, the tenant on the morning of a quarter-day fraudulently removed his goods with intent to avoid a distress for the rent which became due on that day. The landlord, after the rent had become in arrear, and within thirty days of the removal, followed and seized the goods as a distress. The question was whether that was a course which the landlord was entitled to take, having regard to the terms of section 1 of the Act of 1737, which provided that "in case "any tenant . . . of . . . lands . . . upon the demise or holding "whereof any rent is or shall be reserved, due, or made payable, "shall fraudulently or clandestinely convey away, or carry off or "from such premises, his, her or their goods or chattels, to prevent "the landlord . . . from distraining the same for arrears of rent so "reserved, due or made payable; it shall and may be lawful to "and for every landlord . . . within the space of thirty days next "ensuing," to seize the goods. It had already been held in earlier decisions that where the goods were removed before the quarter-day, the section did not apply. The question really turned on the construction of the words "rent so reserved, due, or made "payable." In the course of his judgment, Lord Campbell C.J. said[2]: "[Counsel for the landlord] has satisfactorily shewn that "rent is in one sense due and payable on the quarter day; for "payment on that morning to a tenant for life who dies in the "course of the day could not be good against the heir if the rent "were not due and payable. But the rent, though due on that "day, is not in arrear till the day is elapsed; and there can be "no distress till the rent is in arrear." Erle J., in the course of his judgment, said[3]: "In law, no distress could be made till "the following day; but the rent was due at the beginning of "December 25, though the tenant had the whole of that day in "which to pay it." Although Erle J. says in terms "the rent "was due at the beginning of December 25," I would point out that Lord Campbell C.J. said that it was in one sense due and payable at that time.

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[9] (1613) 10 Co.Rep. 127a.
[10] (1817) 2 Madd. 268.
[11] (1669) 1 Wms.Saund. 275d.
[12] (1776) 2 Wm.Bl. 1075.
[13] (1711) 1 P.Wms. 177.
[14] (1720) Prec.Ch. 555.

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[1] (1853) 2 E. & B. 564.

[2] Ibid. 568.

[3] Ibid. 570.

For that part of his argument which turns on the law ignoring a fraction of a day, Mr. Goodall, for the plaintiff, relies on *Lester* v. *Garland*.[4] That case depended on whether or not A had done a particular act within six calendar months after the testator's decease, and it was held that the day on which the testator died must be excluded from the period of six calendar months within which A had to comply with the condition. But, although in a case of that kind the principle that the law ignores a fraction of a day may very properly be applicable, there is no general rule that that principle is to be applied in every case: see in particular the observations of Lord Esher M.R. in *In re North, Ex parte Hasluck*.[5] In my judgment, the cases to which I shall refer later make it clear that in a case such as the present that principle does not apply.

It seems to me that the test which I have to use for the purpose of deciding whether or not these rents ought to be regarded as capital assets of the testator's estate is whether at the time of his death a cause of action to recover the rent had then accrued. If it had, that cause of action was an asset of the testator's estate at his death, and the fruits of that asset would constitute part of the corpus of his estate. If, on the other hand, the cause of action in respect of these rents did not accrue until after his death, then there is no asset that one can identify comprised in his estate at his death. The cause of action is a right which arises after his death and is as much income as, for instance, a dividend declared on shares after his death would be income of the estate.

I apply myself, therefore, to the question at what date the cause of action in respect of the rents which fell due on December 25, 1954, can be said to have arisen, and help is to be obtained from decisions relating to leases granted by tenants for life before they had statutory power to do so. In that state of the law, the life tenant might have an express power to grant leases conferred upon him by the settlor, and if he granted a lease for a term which in the event extended beyond his own life, the term was unaffected by his death. If, on the other hand, the tenant for life had no such power, he could only grant leases which were binding upon his own interest and estate in the land, and if he died in the course of a term for which such a lease was granted, the lease immediately determined on his death, because it could have no effect on the estate of the remainder-man.

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[4] (1808) 15 Ves. 248.

[5] [1895] 2 Q.B. 264, 269; 11 T.L.R. 417, C.A.

The first case to which I should refer is *Strafford* v. *Wentworth.*[6] The sidenote reads: " Tenant for life makes a lease for " years, reserving rent at Lady Day and Michaelmas, and dies " on Michaelmas Day, about 12 o'clock at noon; the rent shall go " to his executor, and not to the remainder-man; but if such " tenant had a power of leasing, and had died in manner aforesaid, " the rent, in respect to the continuance of the lease, must " have gone to the remainder-man, as incident to the reversion." The tenant for life there had no express power of granting leases. He granted leases for years, reserving rent payable at Lady Day and Michaelmas and died on Michaelmas Day at noon. Lord Macclesfield L.C., who heard the case, declared[7]: " That if " tenant for life makes a lease for years, reserving rent at Lady " Day and Michaelmas, during the term, and dies in Michaelmas " or Lady Day, at 12 o'clock, or any other time before the last " instant, that the rent in such cases is nevertheless due to his " representative; for though the lessee had election to pay it " any time before the last instant of those days, if this lease had " so long continued, yet it being payable on those days during " the term, and the lessor being living some part of those days, " his election to defer it to the last instant was taken away by " such dying, before the rent became completely due, and con- " sequently it would belong to the representatives of the lessor; " and this, he said, was so clear, that he would no more send it " to be determined at law, than he would, whether the father's " estate should descend to the eldest son; for the term having a " continuance some part of those days, the lessee at his peril " ought to pay his rent before the expiration of the term, it being " payable on those days during the term, and the term did sub- " sist on those days, though not to the last instant." A little later he said[8]: " But if such lease were made, by virtue of a " power to make leases in a settlement, as the term subsisted, " and had continuance there by the death of the lessor before the " last instant, the rent would go along with the land to him in " remainder, or reversion; because being payable on those days " during the term, the lessee had till the last instant of those " days to pay his rent, the term enduring till the last instant of " those days, and consequently the lessor dying before it was " completely due, his representatives can make no title to it."

The distinction drawn between the two cases is interesting. In the case of the lease granted under a power, the tenant had until the last instant of the day in which to pay his rent, and, the tenant for life dying before the end of the day, the rent would not belong to the life tenant but would go to the remainderman. On the other hand, where the life tenant granting the lease had no such power, so that the term determined at the instant of his death, the rent became due at the instant of his death and the locus poenitentiae which the tenant would otherwise have had to withhold payment until the last instant of the day disappeared on account of the death of the life tenant; therefore the life tenant's executor was entitled to the rent because the right to the rent was one which was complete at the moment of the life tenant's death.

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[6] (1720) Prec.Ch. 555.

[7] Ibid. 556.

[8] Ibid. 557.

In *Lord Rockingham* v. *Penrice*,[9] another case dealing with a similar point, the lease was granted by a life tenant with power to grant leases. Before his marriage, a certain Sir James Oxenden settled property on his wife for her jointure, with power for himself to make leases at the usual rent. He made leases under which the rent was payable at Lady Day and Michaelmas, and he died on Michaelmas Day. One of the lessees had paid his rent "in the morning of the said 'Michaelmas-day'" but the other tenants had not paid their rent, which amounted to £500. Sir John Trevor M.R. declared [10] that, Sir James Oxenden dying before sunset and there being no remedy for the lessor against the lessee before Sir James's death to compel the payment of a half year's rent, the rent should on Sir James's death go to the jointress, who then had the reversion. That, therefore, is a case opposite to *Strafford* v. *Wentworth* [11] where the leases were granted by a life tenant without the power so to do. It appears from the note to *Ex parte Smyth* [12] that the statement in the report [13] that one tenant had paid his rent on the morning of Sir James's death was inaccurate and it seems that the payment was made not on that morning but on September 21, when there was a surrender of the old lease and the taking of a new lease, but nevertheless Sir James's personal representative was declared to be accountable to the jointress for that rent.

Another case to which I was referred, with which I will not deal in any detail, was *Norris* v. *Harrison*,[14] where reference was made to an earlier observation of Sir Matthew Hale C.B. in

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[9] (1711) 1 P.Wms. 177; 1 Swanst. 345n.

[10] 1 P.Wms. 177, 179.

[11] Prec.Ch. 555.

[12] 1 Swanst. 345n.

[13] 1 P.Wms. 177.

[14] (1817) 2 Madd. 268.

Duppa v. *Mayo*,[15] where he said [16]: "that although the time of "sunset was the time appointed by the law to demand rent, to "take advantage of a condition of re-entry, and to tender it to "save a forfeiture, yet the rent is not due until midnight; for if a "man seised in fee makes a lease for years, rendering rent at the "feast of St. John the Baptist, upon condition of re-entry for "non-payment, now the lessor, if he will take advantage of the "condition, must demand it at sunset; yet if he dies after sunset, "and before midnight, his heir shall have this rent, and not his "executors, which proves that the rent is not due until the last "minute of the natural day."

In my judgment, those authorities establish that, in a matter of this kind, the court does pay attention to the actual moment of the relevant death and does not treat it as an event which is co-terminous with the day on which it occurs, so that the deceased should be regarded as having lived until the last moment of that day. I think these authorities also establish that rent is not completely due until the end of the day fixed for payment, if the term continues until the end of that day, and that there is no cause of action in respect of the rent until the last moment of that day.

That brings me to the last case to which I need refer, *William Clun's* case,[17] in which Sir Edward Coke C.J. observed [18]: "And "it is to be known, that in case of payment of rent issuing out of "land, there are four times of payment, the first time of payment "voluntary and not satisfactory, and yet good to some special "purpose. The second voluntary, and in case satisfactory, and "in case not. The third legal and satisfactory absolutely, and "not coercive. The fourth legal, satisfactory and coercive." He went on to explain that those four times are, first of all, the period before the rent becomes due, during which, if any payment is made, it is a purely voluntary payment and does not operate as a discharge of the obligation to pay the rent, although there may, of course, be an agreement between the tenant and the landlord that when that obligation matures the payment shall be taken in satisfaction. The second is the day fixed for payment of the rent, when, if the tenant likes to pay in the morning, it is in a sense a voluntary payment because he is not bound to pay until

[15] (1669) 1 Wms.Saund. 275d.

[16] Ibid. 287.

[17] (1613) 10 Co.Rep. 127a.

[18] Ibid. 127b.

the last moment of the day, but it is nevertheless a good satisfaction of the obligation to pay the rent on that day. The third is the moment when the rent becomes finally due, that is to say, the last moment of the day; and the fourth is when the rent can be said to be in arrear, which is after the end of the day.

I therefore reach the conclusion that in the present case the tenants' liability to pay these rents did not completely mature until midnight on December 25, 1954; and, the testator having died at about 8.30 in the morning, no cause of action to recover these rents formed part of his estate at the moment of his death; and that the rents eventually received were not received in respect of a right which belonged to him when he died, but in respect of a right which matured after his death.

I think, therefore, that the right conclusion is that (subject to any necessary apportionment) these rents ought not to be treated as capital but as income. If they are treated as income, Mr. Hames concedes that to the extent of one day there should be an apportionment, and that, as regards the rent payable in advance, one day's rent, and as regards the rent payable in arrear, all but one day's rent should be treated as having accrued in the testator's lifetime; the remainder as having accrued since. Had the rents been properly regarded as having accrued before the testator died, it seems that on the authority of *Ellis* v. *Rowbotham*,[19] the Apportionment Act, 1870, would not have applied; but as, on the view which I have taken, they accrued due after the testator died, the Act does apply, and to that extent only, the rent should be regarded as capital.

As regards the payment which was made in respect of the first and second floor maisonette before the death of the testator, the Apportionment Act, 1870, in my judgment does not apply, because that rent had accrued due in the lifetime of the testator, and those rents ought all to be regarded as capital.

I will therefore declare that by reason of the death of the testator having taken place on December 25, 1954, each of the sums mentioned in paragraphs (a) and (b) of question 1 of the originating summons ought to be treated as income of the residuary estate except to the extent of one day's rent in each case, that the amount of rent mentioned in question 1 (c) except to the extent of one day's rent ought to be treated as capital, and that

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[19] [1900] 1 Q.B. 740; 16 T.L.R. 258, C.A.

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ASPINALL, DECD., *In re.*

the rents referred to in paragraph 1 (d) of the originating summons ought to be regarded as wholly capital.

Declaration accordingly.
Costs of trustee on a trustee basis and of plaintiff and first defendant on a common fund basis to be paid out of capital of the estate.

Solicitors: *Theodore Goddard & Co.; Jaques & Co.; Lipton & Jefferies.*

M. G. T.

CROSSLAND (INSPECTOR OF TAXES) *v.* HAWKINS.

C. A.

1961
May 1, 2, 3.

Holroyd Pearce, Upjohn and Donovan L.JJ.

Revenue—Income tax—Settlement—Infant children, on—Series of transactions by parent to avoid surtax on large earnings—Subsequent settlement on children by grandfather—Payment of incomes for children out of dividends from company formed to exploit parent's services—Whether series of transactions not contemporaneous with settlement an "arrangement"—Whether funds for purpose of the settlement provided indirectly by parent—Whether children's income income of parent for tax purposes—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 397 (1) (2), 403.

Revenue—Case stated—Conclusion of mixed fact and law—Conclusion unreasonable—Right of appellate court to interfere.

An actor, whose services had a high market value, claimed, on behalf of his three infant children, repayment of allowances on small incomes paid for their benefit by the trustees of a settlement made by their maternal grandfather out of his own moneys on March 3, 1955. The inspector of taxes opposed the claim on the ground that a series of transactions preceding and following the settlement in date constituted an "arrangement" and therefore a settlement within the meaning of section 403 of the Income Tax Act, 1952,[1] that the father was the "settlor" within that section, and accordingly that the incomes in question fell to be treated, under section 397 (1) of the Act,[1] as the income of the father for tax purposes. The commissioners found that on December 4, 1954, a limited company, of which the father was a director but not a shareholder, was formed with a nominal capital of £100, two shares only being issued to the subscribers to the memorandum, and later transferred to the father's wife and his accountant; that on December 10, 1954, the father agreed to serve the company as an actor in films for a modest weekly salary and expenses; that on March 3, 1955, the maternal grandfather of the children settled £100 of his own moneys on them, trustees being appointed to the settlement; that on March 31, 1955, the trustees used the trust funds to acquire the 98 unissued shares in the company; that in 1956, the company received £25,000 for the father's services as an actor in a film production, and paid him the agreed weekly salary for each week of service; and that on October 18, 1956, the company declared an interim dividend of £500 free of tax, which the trustees distributed for the benefit of the children.

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[1] Income Tax Act, 1952, s. 397: "(1) Where, by virtue or in consequence of any settlement to which this Chapter applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person. (2) This Chapter applies to every settlement, wheresoever it was made or entered into, and whether it was made or entered into before or after the passing of this Act, except a settlement made or entered into before the 22nd

The commissioners, having heard evidence, found that the father was aware that steps were being taken to put into effect proposals of the accountants and solicitors but that he was not consulted with regard to them, and was not present at any meeting when the settlement was discussed and made. They concluded that (i) there was no arrangement to which section 397 of the Income Tax Act, 1952, should apply, and (ii) the father was not a settlor within the meaning of section 403; and they allowed the claim. The trial judge affirmed that decision. On appeal by the Crown:—

Held, allowing the appeal, (1) that there was a sufficient unity about the series of transactions, namely, the formation of the company, the service agreement, and the deed of settlement, although it followed at a later date, to constitute an "arrangement" and therefore a "settlement" within section 403 of the Act of 1952; that in relation to that settlement the father was the "settlor" within the same section, having indirectly provided funds for the purpose of that settlement; and that accordingly, the income in question fell, under section 397, to be treated as the income of the settlor and not as that of the children. Nothing in the language of section 397 required that the whole of the eventual arrangement should be in contemplation from the outset; and where a series of transactions took place within one year of assessment, with the ultimate object of securing money free from the burden of surtax, the fact that the final step to secure that result, namely, the deed of settlement, was decided on at a later date, was not sufficient to

"day of April, 1936, which immediately before that date was irrevocable."

S. 403: "In this Chapter— . . . "'settlement' includes any disposition, trust, covenant, agreement, arrangement or transfer of assets; "'settlor,' in relation to a settlement, includes any person by whom the settlement was made or entered into directly or indirectly, and in particular (but without prejudice to the generality of the preceding words of this definition) includes any person who has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement; . . ."

rob the scheme of the necessary unity to justify its being called an "arrangement."

(2) That on the facts of this case the father indirectly provided funds for the deed of settlement, regarded alone, despite the finding that he did not concern himself with some of the steps in the legal machinery, for a taxpayer did not avoid the incidence of section 397 by giving carte blanche to his solicitors and accountants to effect a scheme for the benefit of his family and refusing to concern himself with its precise form.

(3) That the court was entitled to reject the conclusion of the commissioners that there was here no "arrangement" and that the father was not a "settlor" within section 403, for that conclusion was a mixed finding of law and fact; and if it were a finding of fact it could not be regarded as reasonable.

Decision of Danckwerts J. reversed.

Appeal from Danckwerts J. on a case stated by the Commissioners for the General Purposes of the Income Tax.

A taxpayer, John Edward Hawkins ("Jack Hawkins") an actor, claimed repayment of income tax on behalf of his three minor children, under Schedule 6 of the Income Tax Act, 1952, for personal allowances for the year of assessment ending April 5, 1957. The inspector of taxes opposed the claim. At a meeting of the commissioners to consider the claim the taxpayer, his father-in-law, Horace George Beadle, and his accountant, John Clement Yeates, gave evidence. The following facts were proved or admitted at the meeting: (a) a company was formed on December 3, 1954, under the Companies Act, 1948, in the name of "Roehampton Productions Ltd.," with a capital of £100 divided into 100 shares of £1 each, of which two shares were issued to the subscribers to the memorandum of association [clerks in the office of the taxpayer's solicitors], from whom they were subsequently transferred as to one share jointly to the taxpayer's wife, Doreen Mary Hawkins, and John Clement Yeates, chartered accountant, and as to the other share to Yeates; (b) the taxpayer was not at any time a shareholder in the company, although he was a director; (c) on December 10, 1954, a service agreement was made between the taxpayer and the company, by which the taxpayer agreed to render to the company his services on the terms and conditions therein contained; (d) by a settlement dated March 3, 1955, and made between the taxpayer's father-in-law, Beadle, of the one part, and the taxpayer's wife and accountant as trustees, of the other part, the sum of £100 was settled by Beadle out of his own moneys for the benefit of his grandchildren and the remoter issue. The taxpayer did not supply Beadle with any moneys for that purpose. (e) By a deed of appointment of even date with the settlement expressed to be supplemental to the settlement and made by the trustees, they revocably appropriated the trust property from the date of the settlement in trust for such of the children as should attain the age of 25 in equal shares. (f) The trustees used the funds of the settlement to subscribe on March 31, 1955, for the 98 unissued shares of the company. (g) During the year to April 30, 1957, the taxpayer acted in a film "Fortune is a Woman," the company receiving £25,000 for providing the taxpayer's services. The company paid the taxpayer £900 for 12 weeks' work at the rate of £75 per week made up as to £50 per week salary plus £25 per week for expenses. (h) On October 18, 1956, the company declared and paid an interim dividend for the year to April 30, 1957, of £500 free of tax, which the trustees allocated and paid for the benefit of the children after deduction of tax as follows: (i) Nicholas, £225 3s. 9d.; (ii) Andrew, £153 19s. 11d.; (iii) Caroline, £104 13s.

The tax suffered in respect of that dividend was the subject of the repayment claim in the appeal. (i) The taxpayer was under contract to J. Arthur Rank Productions Ltd. and to a company called Westmead Productions Ltd. to act for those companies, but those contracts were not exclusive and left the taxpayer free to enter into the contract which he did with the company. (j) The taxpayer was aware that steps were being taken to put into effect proposals of the accountants and solicitors, but he was not consulted with regard to them. He was not present at any meeting when the matter of the settlement was discussed or when the deed of settlement was made.

It was contended for the inspector of taxes: (a) that the following events, namely, (i) the formation of the company on December 3, 1954; (ii) the service agreement of December 10, 1954; (iii) the settlement of March 3, 1955; and (iv) the acquisition by the trustees on March 31, 1955, of the shares in the company together formed an "arrangement" within the meaning of section 403 of the Income Tax Act, 1952, and thus a "settlement" within the same section; and (b) that in relation to the aforesaid "settlement" the taxpayer was the "settlor" within the meaning of section 403 as being either the person by whom such "settlement" was made or entered into directly or indirectly, or as being the person who had provided funds directly or indirectly for the purpose of such settlement; (c) that, accordingly, under section 397 of the Act of 1952 the income in question fell to be treated as the income of the taxpayer; and (d) the repayment claimed should be refused.

For the taxpayer it was contended: (a) that the settlement under which his children derived the income in question was the written settlement of March 3, 1955, and the settlor in relation to that settlement was Beadle; (b) the taxpayer was not party to any arrangement in connection with the settlement, nor did he provide or undertake to provide funds for the purpose thereof, and he was not a settlor in relation thereto within the meaning of section 403 or section 397 of the Act of 1952; (c) accordingly, the taxpayer as the guardian of the children was entitled to repayment of the personal allowances due to the three children.

Annexed to and forming part of the case were the following documents, some of which are referred to in the judgments of the Court of Appeal: memorandum and articles of association of Westmead Productions Ltd.; service agreement with Westmead Productions Ltd.; memorandum and articles of association of Roehampton Productions Ltd.; service agreement with Roehampton Productions Ltd.; settlement dated March 3, 1955; deed of appointment dated March 3, 1955; accounts of Roehampton Productions Ltd. for the two years to April 30, 1957.

The commissioners, after considering the evidence submitted and reviewing the arguments, unanimously allowed the claims and gave their decision as follows: (1) there was no arrangement to which section 397 of the Income Tax Act, 1952, should apply, and (2) the taxpayer was not a settlor within the meaning of section 403 of the Act. They accordingly ordered that the allowances—small income relief and personal allowances—claimed be allowed.

The inspector of taxes appealed, the question of law being whether on the facts stated and a proper construction of sections 397 and 403 of the Act of 1952, the taxpayer was entitled to repayment of the allowances claimed in respect of the payments made by the trustees for the year of assessment 1956–57.

On appeal, Danckwerts J. on November 14, 1960, affirmed the decision of the commissioners in favour of the taxpayer, holding that the taxpayer could not be regarded as having provided the funds for the settlement of March 31, 1955, since he was not the settlor of that settlement, had contributed nothing to it, and that as it came later than the formation of the company and the services agreement of December 1954, those transactions could not be read into the settlement. Moreover, the trial judge took the view that paragraph (j) of the stated case was a finding that there was no comprehensive arrangement at the outset of which the deed of settlement formed part. He concluded that the taxpayer was not a party in any way to any scheme under which a company was to be formed, a contract would be made with the company for his services, and then a settlement would be made which would involve benefits from the first transactions for his children: and he, accordingly, dismissed the appeal of the Crown. The Crown appealed.

B. L. Bathurst Q.C., *E. Blanshard Stamp* and *Alan Orr* for the Crown. The settlement of March 3, 1955, is clearly a settlement to which section 397 of the Act of 1952 applies, and the main question is whether the taxpayer was the "settlor" in relation to that settlement, having regard to the wide terms of the definition of "settlor" in section 403, as including any person who has provided funds "indirectly" "for the purpose of the "settlement." The court may look at the surrounding circumstances and trace the funds to their original source, namely, the service agreement entered into, on December 10, 1954, with a company which could not at that date have paid the taxpayer any salary, and under which the taxpayer agreed to give his services at a fraction of their market value to that company. Those circumstances lead to the conclusion that the father provided the funds indirectly for the purpose of the settlement. In *Copeman* v. *Coleman*[2] there was no "settlement" outside the company arrangements, but the court held that the father was the settlor who had provided funds indirectly for the artificial "settlement" which the Crown had to show. The task is easier here, for there is an admitted settlement.

Alternatively, the various transactions themselves constituted a settlement to which section 397 applies, since by definition in section 403 "settlement" includes "any . . . arrangement": see, on the meaning of "arrangement," *Inland Revenue Commissioners* v. *Payne*, *per* Lord Greene M.R.[3]; *Inland Revenue Commissioners* v. *Morton*, *per* Lord Fleming[4]; *Inland Revenue Commissioners* v. *Prince-Smith*, *per* Macnaghten J.,[5] and *Newton* v. *Commissioner of Taxation of the Commonwealth of Australia*.[6]

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[2] [1939] 2 K.B. 484; [1939] 3 All E.R. 224.

[3] (1940) 23 T.C. 610, 626, C.A.

[4] 1941 S.C. 467, 476.

[5] [1943] 1 All E.R. 434, 437.

[6] [1958] A.C. 450, 465; [1958] 3 W.L.R. 195; [1958] 2 All E.R. 759, P.C.

In *Chamberlain* v. *Inland Revenue Commissioners* Lord Macmillan[7] took a narrower view of "arrangement," but it is distinguishable on the facts.

The taxpayer here provided the funds when he acted for the third party and earned the money which went to the company at a time when he knew that all the issued shares in the company were in the hands of the trustees. The income of the children originated from the taxpayer either because it was income from the valuable service agreement which he made with the company or because it was income provided indirectly by his employers. In either case it must be treated as the taxpayer's income under section 397. See also section 401 of the Act, dealing with the case where there are two settlors, and enacted after the decision in *Lord Herbert* v. *Inland Revenue Commissioners*.[8] Here there are two settlors, the grandfather and the taxpayer, but under section 401 (1) only the father is liable for the income tax.

As to the odd finding of the commissioners in paragraph 2 (*j*) of the case, the court is not obliged to shut its eyes to reality and accept that the taxpayer did not know what the proposals were, for the court knows that he was a director of the company and therefore party to the issue of the 98 shares to the trustees. He knew what it was all about. He had a scheme put before him and told his professional advisers to get on with it; but in the absence of any contrary finding by the commissioners the court is asked to find that he did know about the scheme even though he did not know its details and technicalities. On either of the two grounds the income in question must be treated as the taxpayer's income.

R. E. Borneman Q.C. and *C. N. Beattie* for the taxpayer. The only motive for the transactions which took place here was to spread the load of surtax. It has long been common practice among persons with high earnings which may be short-lived to enter into agreements of the kind here in question, with companies, not with the object of making a settlement on their children but in order to minimise their own tax liability.

The Crown's attack from the outset was on what they claimed was an "arrangement," and therefore everyone who could give relevant evidence was called before the commissioners, who found that there was no "arrangement." It is conceded that if there was from the beginning a concerted plan, there is an

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[7] (1943) 59 T.L.R. 343, 345–346; [1943] 2 All E.R. 200, H.L.

[8] [1943] K.B. 288; 59 T.L.R. 171; [1943] 1 All E.R. 336.

"arrangement," and therefore a "settlement," within section 403 and the taxpayer is a "settlor." But here, having formed the company and entered into the service agreement, this taxpayer had no further concern with the matter; and, as the trial judge found, he was in no way concerned in the settlement by his father-in-law on his children.

[UPJOHN L.J. But the court may infer from the findings that the taxpayer was the beneficial owner of the shares when the company was formed and that the solicitors' clerks to whom the two original shares were issued were his nominees?]

In the absence of any such finding in the case it cannot be assumed that the taxpayer was at any time the beneficial owner of the shares.

The commissioners' finding in paragraph 7 that there was no arrangement within section 403 to which section 397 applies is a finding of fact, and the court can only interfere with it if there was no evidence to justify that finding: see *Anderson* v. *Inland Revenue Commissioners*,[9] and *Smart* v. *Inland Revenue Commissioners*, *per* Croom-Johnson J.,[10] on the impropriety of filling a gap in the evidence by drawing an inference. Here all the evidence was gone into and therefore the finding in paragraph 7 cannot be impugned. All that the court can do is to send the case back for further details.

In order to succeed, the Crown must show (a) that there was an "arrangement" and (b) that the taxpayer was the settlor. When the legislature threw its net so widely, as it did in this definition of "settlor," it also indicated by the phrase "for the "purpose of"—in the singular—that the court cannot look beyond the point of time when the settlement is made unless other things remain to be done. The only settlement which can be challenged under section 403 is the actual gift of the grandfather, and before it can be said that money or funds have been provided "for the purpose of" that settlement it must be shown that they were provided either prior to or contemporaneously with the settlement. "For the purpose of the settlement" means "for the purpose of being settled." Reliance is placed on the use of the past tense in section 403: "by whom the settlement "was made" and "has provided," showing that the relevant date is the point of time at which the settlement is made. If funds were provided after the grandfather's settlement, that would constitute a separate "settlement"; that does not arise here. On the admitted facts this taxpayer had provided and agreed nothing on March 3, 1955, unless it is said that there was an "arrangement." It was not until March 31, 1955, when the trustees used the trust money to buy the shares in the company, that the service agreement came into the settlement. Further, prima facie, the provision of services is not the provision of "funds"; but even if "funds" includes "services," they were not provided for the purpose of the settlement of March 3.

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[9] (1933) 18 T.C. 320, 326.

[10] (1949) 29 T.C. 338, 344.

The authorities cited as to the meaning of "arrangement" are not challenged, but what was said by Lord Macmillan in *Chamberlain* v. *Inland Revenue Commissioners*[11] is support for the present submission that, before an "arrangement" can be found, there must be a "single scheme." Here there was no single unified scheme and no arrangement from beginning to end. Section 401 applies to the case where there are two settlors, but here there was only one—the grandfather—so that section 401 does not apply.

Bathurst Q.C. in reply. The commissioners' finding in paragraph 7 that there was no "arrangement" is a conclusion of law or at most of mixed fact and law and therefore the court can interfere.

HOLROYD PEARCE L.J. I will ask Donovan L.J. to give the first judgment.

DONOVAN L.J. The heavy incidence of surtax on large incomes has for some time led artistes and others in the world of entertainment to adopt the device of forming a limited company which they control, and giving the company, by means of a service agreement, the right to their services. In return, the company pays the artiste some modest salary. The company then hires the artiste out to whomsoever requires his services, and itself obtains the consideration for them.

From its profits, the company must distribute a reasonable dividend, if it is to avoid surtax on the whole of its profits—see section 245 of the Income Tax Act, 1952—but it is allowed to make such reserves as are required for the maintenance and development of the business; and where the business depends on the fortunes of a particular artiste, these reserves may be considerable.

In this way, surtax on the whole of the artiste's earnings is reduced to surtax on the salary he gets from the company, plus such dividend as is distributed to him; and when eventually the company is wound up, the accumulated reserves of past years will come to him as capital.

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[11] 59 T.L.R. 343, 345–346.

All this is perfectly legitimate, and indeed in the case of persons whose high earnings may be short-lived, understandable. Hawkins, the taxpayer, adopted such a scheme in May of 1954, using a company called Westmead Productions Ltd., with a nominal capital of £100. The present appeal is not concerned with that scheme, but it may be useful to bear its existence in mind. The service agreement in that case was to last for five years only from April 1954 and was confined to the services Hawkins was to render in the making of three productions, being stage plays or films.

On December 3—the same year—1954, there being presumably additional engagements in prospect, the scheme was repeated, this time with a new company called Roehampton Productions Ltd. Again the capital of the company was a nominal capital of £100, and at first two shares alone were issued to the subscribers in the memorandum of association, who were, it would seem, clerks in the office of the taxpayer's solicitors. The business which the company was to carry on included the purchase and sale of real and personal property of all kinds, and in particular copyrights; the business of theatre and cinema proprietors and managers; the making, production and exploitation of motion pictures; the making of engagements with artistes and others; and the assignment of their services.

The service agreement with Hawkins followed within a few days, on December 10, 1954. It was declared to be subject to Hawkins' existing engagements with Rank Productions Ltd. and with the company Westmead Productions Ltd., to which I have already referred. By the present agreement, the company agreed to engage Hawkins, and he agreed to serve it as an actor or writer in two stage or film productions during three years from December 10, 1954. It was provided, among other things, that the company could—with Hawkins' approval, which he was not unreasonably to withhold—assign or lend his services to a third party. The company was to pay Hawkins £50 a week and expenses during each week that he rendered services. Hawkins was to be entitled to refuse to render any service which he reasonably thought would be detrimental to his reputation. The agreement is exhibited to the case, and I need not abstract it further.

So far the familiar pattern was followed: The company, and not Hawkins, would receive the enviable salary for his work as an artiste, and all Hawkins would get would be £50 a week, at least until the company was wound up, and thus surtax would be reduced.

Mr. Borneman has strenuously contended before us that in the beginning nothing more was intended as a surtax-saving operation. In particular, the settlement, which followed after an interval of about three months of the shares of this company, was not contemplated from the beginning, as the Crown in one part of its argument asked us to infer. There is no express finding in the case stated on this point; indeed, the case is not very fully or happily stated at all, but one conclusion is obvious and not, I think, disputed. Hawkins was not going to make a present of his services, less £50 a week, to two clerks in his solicitor's office, who on the face of things were at the beginning the only shareholders in the company. At some time he would want to have the money which had escaped surtax for himself, for example, in a liquidation of the company, or to bestow it on others whom he wished to benefit, for example, his family. Otherwise, the whole operation was pointless.

I will accept for the moment the proposition that the family settlement which followed was not decided upon at the outset; but what is important, I think, is that the eventual enjoyment by some individual or individuals of the money which had escaped surtax must have been in contemplation at the outset. Otherwise, as I say, the scheme had no rational purpose.

The subsequent events were these: At some time not specified in the case, but which I think must have been before March 31, 1955, the two solicitor's clerks transferred their shares, one to the taxpayer's wife and the taxpayer's accountant, to be held jointly, and one to the accountant himself. On March 3, 1955, one Beadle, who is the grandfather of the taxpayer's children, made a settlement of £100 of his own money for their benefit. The taxpayer's wife and his accountant were the trustees. The trustees were to stand possessed of the trust fund upon trust to pay the income to, or apply it for the benefit of, the children of the taxpayer and Mrs. Hawkins, in such proportions as they thought fit. At the end of a trust period defined in the settlement, the capital was to go to such of these children as were then living, in equal shares, with certain contingent remainders over. Notwithstanding these provisions, the trustees were empowered to appoint by deed all or any part of the trust property to any one or more of the beneficiaries under the settlement, either absolutely or contingently.

On the same day, namely, March 3, 1955, the trustees exercised this power and appointed the trust property and its income to such of the three children of Hawkins as should attain 25, and if more than one, in equal shares, absolutely. The trustees of this settlement then used £98 of this £100 in subscribing for the ninety-eight unissued shares of Roehampton Productions Ltd., which were issued to them on March 31, 1955. They thus became the sole owners of the equity in this company, which had the prospect of receiving large sums under the service agreement with Hawkins. The other shareholder was the accountant with his one share.

That prospect of dividend did not, however, mature for some time, during which the trustees got nothing on their shares, but at some time during the year 1956, the company received £25,000 for the lending or assigning of Hawkins' services to somebody, to act in a film called " Fortune is a Woman." Then, on October 18, 1956, the company declared a dividend of £500 free of tax which went to the trustees of the settlement. They, in turn, applied the bulk of this for the benefit of the taxpayer's three infant children as follows: Nicholas, £225; Andrew, £153; Caroline, £104.

In due course, repayment claims were submitted to the Inland Revenue by the taxpayer as the children's guardian, claiming back tax deducted at source from this dividend, to the extent that the children were entitled to small income relief and personal allowances. The inspector of taxes opposed the claim. The general commissioners on appeal by the taxpayer allowed it; and their decision has been upheld by the judge.

The Crown says that the income so received or enjoyed by the children under the deed of settlement is deemed to be the taxpayer's income by virtue of section 397 of the Income Tax Act, 1952. This reproduces section 21 of the Finance Act, 1936, by which the growing habit of saving surtax by settling capital or income on one's children was checked. Subsections (1) and (2) of section 397 are as follows: [His Lordship read section 397 (1) and (2) and the relevant parts of section 403, the definition section, and continued:] The true construction of the word " arrangement " in that definition is not in dispute. It will be found in the cases cited to us, which I will mention, but need not in the circumstances read. They are: *Copeman* v. *Coleman*[1]; *Inland Revenue Commissioners* v. *Prince-Smith*[2]; *Inland Revenue Commissioners* v. *Payne*[3]; and *Hood Barrs* v. *Inland Revenue Commissioners*.[4] The argument for the Crown is first of all this: Here there is a settlement in the ordinary sense of the word, namely, the deed of settlement of March 3, 1955. Hawkins did provide money for the purpose of that settlement, the means of such provision being the service agreement producing money for the company, and the company in turn distributing part of the money to the trustees. Alternatively it is said that the formation of a company, the service agreement and the deed of settlement together form an arrangement within the terms of section 403, and so are a settlement for the purposes of section 397. For that settlement, likewise, Hawkins provided funds and is therefore a settlor.

It will be convenient to deal with this alternative argument, first, because it was the only argument advanced to the general commissioners, and, secondly, because Mr. Borneman agrees that if there is such an arrangement here, then the taxpayer was a settlor within the definition, and must fail in this appeal.

What he argues in opposition to the Crown's argument is this: To constitute an "arrangement" for this purpose, the whole of it must be in contemplation at the outset. Here it was not, and he prays in aid what the commissioners say in paragraph 7 of the case stated, after hearing all the evidence, namely—again I quote—that "there was no arrangement to which section 397 "should apply." Therefore Hawkins did not provide funds for any such "arrangement," for when he agreed to sell his services to the company, the deed of settlement was not in being, nor, so far as the evidence goes—says Mr. Borneman—in contemplation.

After careful consideration, I am unable to accept these propositions. In the first place, I do not think that the language of section 397 requires that the whole of the eventual arrangement must be in contemplation from the very outset. Confining oneself for the moment to the facts of this case, and remembering that income tax is an annual tax, one finds the whole "arrange-"ment" conceived and in being in the one income tax year, 1954–55. The company is formed, the service agreement executed, and the deed of settlement made, all in this one year. But even were it otherwise, I think there is sufficient unity about the whole matter to justify it being called an arrangement for this

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[1] [1939] 2 K.B. 484; [1939] 3 All E.R. 224.

[2] [1943] 1 All E.R. 434.

[3] (1940) 23 T.C. 610, C.A.

[4] [1946] 2 All E.R. 768; 27 T.C. 385, C.A.

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purpose, because, as I have said, the ultimate object is to secure for somebody money free from what would otherwise be the burden or the full burden of surtax. Merely because the final step to secure this objective is left unresolved at the outset, and decided on later, does not seem to me to rob the scheme of the necessary unity to justify it being called an "arrangement." Particularly is this so in a case such as the present, when one recalls certain other features of it. Thus, Hawkins, though not on the register of members, was a director of the company. He entered into this contract for services for a consideration which is a fraction in value of what he gives to the company in return. He, as a director, has to agree to the issue of the 98 shares to the trustees: he as a director has to agree to the interim dividend of £500, free of tax, being paid on this £100 of capital.

Bearing in mind the ultimate object of securing money free from the burden—or the full burden—of surtax, can it matter for present purposes that the precise way of securing this result was not decided upon at the very outset? I think not. An alternative way of looking at the matter would be this: Here the repayment claim is made in the year 1956–57. In that year the arrangement is complete, and that is enough. It would be irrelevant that it came into being by instalments in the year 1954–55. The Revenue looks at the facts of the year being taxed or for which repayment of tax is being sought, and asks in this year "Is it true to say "that there is a settlement of the kind mentioned in the section, "and in this year is it true to say that the settlor has provided "funds for the purpose of the settlement?"

Naturally, the finding of the commissioners in paragraph 7 of the case stated is much relied on, but it is by no means a clear finding of fact that no "arrangement" existed. I construe it as a finding that the various steps taken did not constitute an arrangement within the meaning of section 397—which at the very least would be a mixed question of fact and law. In any event, on the facts, I do not think a finding of "no "arrangement" could be regarded as reasonable.

That is strictly enough to conclude the present case, for it is conceded that if there be an arrangement within the meaning of section 397, then Hawkins did indirectly provide funds for the purpose of the settlement constituted by such arrangement, and that accordingly the dividend must be regarded as his income and not that of his children. I would say a word or two, however, regarding the first argument of the Crown, namely, that Hawkins provided funds for the settlement constituted by the deed of March 3, 1955, regarded alone, and is therefore a settlor in relation to it. This seems to have been the primary argument before Danckwerts J., and he rejected it, taking the view that Hawkins could not be regarded as providing funds for a settlement of which he was not the settlor, and to which he contributed nothing, unless somehow the formation of the company and the service agreement could be read into the settlement. This he declined to do, because the deed of settlement came later in date, and because he took the view that paragraph (2) (j) of the stated case was a finding that there was no comprehensive arrangement at the outset of which the deed of settlement formed part. The finding is as follows: "The [taxpayer] was aware that "steps were being taken to put into effect proposals of the "accountants and solicitors, but he was not consulted with regard "to them. He was not present at any meeting when the matter "of the settlement was discussed or when the deed of settlement "was made." The judge then comments on that in this way: "Consequently, he was not a party in any way to any scheme "under which a company was to be formed, a contract to be "made with the company for his services and then a settlement "to be made which would involve benefits from the first "transaction for his children. He was quite obviously not a "party in any way, and that seems to me a most material factor "in the case."

I regret I cannot go that length. Mr. Borneman, when asked what the "proposals" of the accountants and solicitors were, conceded that they included this deed of settlement. The taxpayer therefore was aware of this item in the proposals, and that steps were being taken to put it into effect, albeit that he may not have been consulted when the terms of the settlement were discussed, or the settlement signed. Even if the matter stopped there I should in those circumstances have little difficulty in holding that when the dividend was ultimately declared it came from funds indirectly provided by Hawkins for the purpose of the deed of settlement.

The matter, however, does not stop there. On December 10, 1954, when Hawkins agreed to give his services to the company for a fraction of the reward the company would get by lending him to some theatrical or film producer, the two shareholders in the company were either the two solicitor's clerks, or Mrs. Hawkins and the accountant jointly as to one share and the accountant as to the other. If it were the two solicitor's clerks, the irresistible inference from the facts is that they were mere nominees for Hawkins. It can hardly be imagined that they were

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free to exploit the service agreement for their own individual benefit. If, therefore, the beneficial ownership of the shares was in Hawkins, then when he later transferred or concurred in transferring, or concurred in the issue of, shares to the trustees of the deed of settlement, so that they became the only shareholders, he was in fact concurring that the equity in the company should pass from him to them; and when eventually there is a fund of profit derived from Hawkins' services and a distribution of part of it to the trustees, again I see no difficulty in holding that the result of all that has gone before is that he has provided funds indirectly for the purposes of this settlement.

If, however, at the date of the service agreement, the two persons who afterwards became trustees of the settlement were the shareholders, then two conclusions would seem to me to follow, (1) that the idea of this family settlement was in mind at the outset, and (2) that by this agreement Hawkins was taking steps to see that the trustees would eventually get funds. When that event happened, it was he who indirectly provided the money.

It remains only to notice one other point in Mr. Borneman's argument, namely, that the use of the word " purpose " in section 403 of the Act in the singular shows that the legislature had in mind only those cases where the provision of funds or the undertaking to provide them was contemporaneous with the settlement.

I have said enough, I think, to make it clear that I cannot accept this argument which I think is altogether too refined. The statute seems to me to use the word " purpose " and " purposes " indiscriminately: see, for example, section 401 (3) (*a*).

For those reasons I think that this appeal should be allowed.

HOLROYD PEARCE L.J. I agree with my Lord. It is clear that the sequence of events in question was intended to lessen the incidence of surtax. The natural inference from that sequence of events is that an arrangement was made which would come within section 397 as interpreted by the definitions in section 403. It is argued that that natural inference was on the evidence found to be wrong, but in my judgment all the facts point to the conclusion that it is correct.

Are we then bound to uphold the bald conclusion (unsupported by reasons) that " there was no arrangement to which section 397 " of the Income Tax Act, 1952, should apply and the [taxpayer] " was not a settlor within the meaning of section 403 of the said " Act " ? That conclusion is not a finding of fact. It is a mixed finding of law and fact, and is thereby more easily assailable. For an error in such a mixed finding need not be due to any element of unreason such as is necessary to justify an interference with a pure finding of fact. An error may well have arisen from a mistake of law in the application of two complicated sections to a not uncomplicated sequence of events.

The only guidance that one can obtain from the statement of facts seems to confirm that it was a mistaken view of the law that led to the mixed conclusion of law and fact. Paragraph 2 (j) says "The [taxpayer] was aware that steps were being taken to "put into effect proposals of the accountants and solicitors but "he was not consulted with regard to them. He was not present "at any meeting when the matter of the settlement was discussed "or when the deed of settlement was made." The clear inference is that proposals had been made by his accountants and solicitors and that he was aware that steps were being made to carry them out, but that the fact that he was not consulted about the details of the settlement and was not present when the deed was made had a bearing on the result. In truth that fact was irrelevant. The proposals were clearly proposals for achieving the result that has been achieved, namely, a family settlement financed by dividends produced by Hawkins' contract to sell his services to the company at an inadequate and uncommercial rate. Had the proposals been of any other nature the case must inevitably have so stated. The foundation of those proposals was his earning power and they needed not merely his assent but his active participation. He personally entered into the contract to serve for an inadequate remuneration, he was himself a director of the company when the shares were allotted to the trustees, when the large profit was made by the company's use of the contract, and when the dividend was declared. And above all he himself created the source of the company's profit by acting in the film "Fortune is a Woman."

The mere fact that he did not concern himself with some of the "steps" in the legal machinery involved does not make it any the less his arrangement within the section. A man does not avoid the incidence of section 397 by merely being absent from and leaving to his solicitors and accountants certain parts of the legal machinery if he is aware of the proposals for an "arrangement" or a settlement and actively forwards them by personally carrying out and assisting in the vital parts in which his performance and co-operation are necessary. Nor can he avoid liability by merely giving his solicitors carte blanche to effect some

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scheme for the benefit of his family and refusing to concern himself with its precise form.

The commissioners would appear by the wording of the case to have been unaware of this principle, and in my judgment it must have been this error that led them to a wrong conclusion.

It is contended that the proposals which the taxpayer was intending to forward were directed to some different avoidance of surtax and that he did not have in mind this precise settlement. With all respect to the judge, who held a contrary view, I cannot agree that that fact, if proved, could have the effect of taking this arrangement out of section 397, since the taxpayer was actively carrying out personally some of the steps necessary to the arrangement and his solicitors and accountant were acting in the other steps; but in any event such a contention was not made out on the facts and there is nothing in the case to suggest it.

Moreover, in my judgment, even if the commissioners conclusion was one of fact alone, the observations of Lord Simonds and Lord Radcliffe in *Edwards* (*Inspector of Taxes*) v. *Bairstow* [5] apply, and I would hold that the only reasonable conclusion from the facts in the case is that there was an arrangement to which section 397 applies and that the taxpayer was the settlor within section 403.

UPJOHN L.J. I agree with both the judgments that have been delivered and do not desire to add anything.

Appeal allowed with costs in Court of Appeal and below.

Declaration that the income in question fell to be treated as that of the taxpayer, and not as the income of any other person.

Tax repaid in consequence of the commissioners' order to be refunded to the Revenue under section 64 *of the Income Tax Act*, 1952.

Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor, Inland Revenue; J. D. Langton & Passmore.*

M. M. H.

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[5] [1956] A.C. 14, 29, 34; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48, H.L.

A. ROBERTS & CO. LTD. AND ANOTHER v. LEICESTERSHIRE COUNTY COUNCIL.

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April 18, 19, 20, 21, 24, 25, 26, 27;
May 2.

Pennyeuick J.

[1958 A. No. 2162.]

Contract—Rectification—Mistaken belief that particular term included—Execution of contract by other party knowing of first party's mistake—Whether first party entitled to rectification.

Estoppel—Conduct, by—Contract—Mistaken belief of one party that term included—Execution by other party with knowledge thereof—Rectification.

On January 30, 1954, in answer to an advertisement by the county council, a company submitted a tender to erect a school for £165,910 in which the period for completion of the works was left blank. On February 5, a sub-committee of the education committee of the council resolved to accept the company's tender subject to negotiation of a reduction in price and, on February 22, C., one of the council's officers, so informed the company. On March 8, the company submitted a revised tender at a price of £138,399 9s. 3d. The revised tender specified the period for completion of the works as 78 weeks from instructions to proceed with the works. After the receipt of that tender C. and S., another of the council's officers, decided that the period for completion to be inserted in the contract should not be 18 months as stated in the revised tender but 30 months. S. then instructed T., another officer of the council, that the period for completion was to be 30 months and T. instructed the clerk to the council to prepare the written contract on that footing.

On March 13, T. wrote to the company informing it that the committee had accepted its tender of £138,399 9s. 3d. enclosing an official order asking the company to execute the work in accordance with the tender of March 8 at £138,399 9s. 3d. The contract was sent to the company on March 17 and specified the date for possession as March 25, 1954, and the date for completion as September 30, 1956. None of the officers of the council called the attention of the company to the fact that the period for completion inserted in the contract differed by a year from that specified in the revised tender. There was a direct relationship between the period for completion and the price and had the company made the revised tender on the basis of a 30-month rather than an 18-month period the price quoted therein would have been higher. The company's seal was affixed to the contract on or about March 24 in the presence of two directors and the secretary of the company, all of whom, at all material times, believed that the period for completion was 18 months. The contract was returned to the council on March 25.

On March 30, there was a meeting between officers of the council, including S., and of the company at which a period of 18 months was mentioned. On April 5, there was a further meeting at which one of the officers of the company produced a progress schedule showing a period for the completion of the works of 72 weeks and S. saw that document. The council executed the contract on April 12.

In February, 1955, the directors of the company learned that the council was working on the basis of a 30-month period for completion and wrote to the council asking them to arrange for the date of completion to be corrected to September 30, 1955, but the council declined to do so. The company had difficulties with the sub-contractors nominated by the council and did not complete the work until early in 1956. In an action by the company claiming, inter alia, rectification of the contract by inserting September 30, 1955, for September 30, 1956, as the date for completion:—

Held, (1) that, on the evidence, the council and the company were not at one as to the date for completion to be inserted in the contract so that the company was not entitled to rectification on the ground that the 30-month period for completion was inserted in the contract by a common mistake;

(2) That a party was entitled to rectification of a contract if he proved beyond reasonable doubt that he believed a particular term to be included in the contract and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed that term to be included; that the facts raised beyond reasonable doubt the inference that, by the end of the meeting of April 5, S., whose knowledge should for this purpose be treated as the knowledge of the council, knew that the company believed the period for completion under the contract to be 18 months; and that, therefore, the company was entitled to rectification of the contract as claimed.

ACTION.

The following statement of facts is taken from the judgment of Pennycuick J. The second plaintiff, A. Roberts & Co. (Holdings) Ltd., at all relevant times carried on the business of building contractors under the name now borne by the first plaintiff, A. Roberts & Co. Ltd. As the result of a reconstruction in 1956, it became a holding company with its present name and the first plaintiff was incorporated as a trading company to take over its business. The second plaintiff (hereinafter called "the company") was the party concerned in all the proceedings to which the action related. On December 23, 1953, the Leicestershire County Council published an advertisement for tenders for the erection of a school to be known as the Hinckley Burbage Secondary Modern School. It was important to the council that work on the school should begin before March 31, 1954, since otherwise it would not qualify for a grant for the year 1953–54 from the Ministry of Education. On January 30, 1954, the company put in a tender in the following terms: "Leicester County Council. "Hinckley Burbage Secondary Modern School—Erection. Form "of Tender. To the Leicester County Council. We the undersigned do hereby tender and undertake to carry out the above-mentioned works in accordance with the conditions of contract, drawings and bills of quantities and to the satisfaction of the county architect, for the sum of (in words) one hundred and sixty-five thousand nine hundred and ten pounds only. Amount of tender £165,910 0s. 0d. We agree to maintain in complete repair the whole of the new works executed for a period of six months after the certified date of completion. If this tender is accepted we agree to enter into an agreement for the due performance of the works, and to complete the works within —— of the date of instructions to proceed. As witness our hand this thirtieth day of January 1954." The tender was signed "E. B. Cruse, technical director. A. Roberts & Co. Ltd." The period within which the company agreed to complete the works was left blank.

On February 5 the tenders sub-committee of the education committee of the council resolved that the company's tender be accepted subject to reduction being negotiated to bring the cost within the figure authorised by the Ministry. On the same date one Collins, the county architect, wrote to the company as follows: "Hinckley Burbage Secondary Modern School. I have to inform you that your tender for the erection of the above-named school is among the low ones receiving consideration. I enclose copy of the bill of quantities and shall be glad if you will price this in and let me have it back again by Monday, February 15, 1954." On February 9 he wrote to the company: "With reference to my letter of February 5, 1954, I shall be grateful if when you forward the completed bill of quantities you will give me a list of recent contracts which you have carried out and the extent of these." On February 12 the company replied complying with these requests.

On February 22 Collins wrote to the company: "I have to inform you that the committee has recommended for acceptance your tender for the erection of the above-named school, subject to the tender being reduced by the adjustment of P.C.'s and the omission of certain items, by £28,000 approximately, and to the approval of the Ministry of Education. It is hoped that this approval will be received within the next fourteen days. In the meantime would it be possible for you to make preliminary arrangements for the contract guarantee bond in a sum of 10 per cent. of the amount of contract, and let me have a letter from your guarantors that they will be prepared

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"to act as surety and that there will be no delay when the contract documents are forwarded for completion. This information is required to ensure that the work is started before March 31, 1954." The company obtained an assurance from its bank that the bank would be prepared to join in a performance bond and so informed Collins.

On March 8, 1954, the company sent to the council a revised tender in which the figure of £138,399 9s. 3d. was substituted for the figure of £165,910 0s. 0d. The revised form of tender contained a further important departure from the original tender in that it proceeded to specify the time within which the company agreed to complete the works, namely, within 78 weeks of the date of instructions to proceed. A day or two after receipt of that tender one Thornton, the progress officer in the architect's department of the council, asked one Smith, the assistant county architect for the education section, who, under Collins, had the handling of the matter, whether the date for completion under the contract should or should not be 78 weeks, i.e., the period mentioned in the revised tender as the period from the date of instructions to proceed to the date of completion.

As the result of that question Smith had a discussion with Collins at which they decided that the period for completion to be inserted in the contract should be not 18 months but a whole year longer, namely, 30 months. The date was altered for the benefit of the council and not that of the company. There was a direct relationship between price and contract period, and if the company had made its tender on the basis of a 30-month period the price would have been higher. Collins and Smith deposed to the deliberate selection of the 30-month period: Thornton deposed that he was instructed by Smith that the period was to be 30 months, and His Lordship accepted the evidence of Collins, Smith and Thornton on this point.

At that stage Collins personally dropped out of the picture, leaving the matter in the hands of Smith. It was accepted by the council that Smith acted throughout with the authority of Collins. Smith in turn gave instructions to Thornton to take the next steps in the matter. On March 11 Thornton sent a memorandum over the signature of Collins to the clerk to the council to the following effect: "Memorandum from county architect to the "clerk of the county council. March 11, 1954. Hinckley Burbage Secondary Modern School. I shall be grateful if you will "arrange for the preparation of the contract documents for the "erection of the above-named school. Particulars you require are "as follows . . . (c) Amount of tender: £138,399 9s. 3d.; (d) "Amount of bond: £13,839; (e) Name, address and status of "contractors: A. Roberts and Co. Ltd., 79, Eccleston Square, "Victoria, London, S.W.1; (f) Date for possession: March 25, "1954; (g) Date for completion: September 30, 1956."

On March 13, Thornton, again over the signature of Collins, wrote to the company in the following terms: "Dear Sirs, "Hinckley Burbage Secondary Modern School. I have to inform "you that the committee has accepted your tender amount- "ing to £138,399 9s. 3d. for the erection of the above-named "school. The official order No. CA/A.2623 is enclosed. Work- "ing drawings will be forwarded to you in due course. The "contract documents will be sent by the clerk of the county "council within the next few days. I am inserting in the contract "a provisional starting date of March 25, 1954. Will you kindly "note that the work must not be started until the contract "documents have been completed and returned to the clerk. "When the contract documents are received I shall be glad if "you will deal with these as quickly as possible as it is impera- "tive that the work be commenced as near as possible to the "date given in the contract and in any case not later than March "31, 1954. I shall also be glad if you will endeavour to have the "contract guarantee bond completed as expeditiously as possible. "When you are in a position actually to commence the work, "will you kindly inform me by letter when I will arrange for my "representative to meet you on the site." With that letter was included an official order addressed to the company containing the following terms: "Please execute the work stated below, "in accordance with your tender of 8/3/54 @ £138,399 9s. 3d. "The whole of the work to be done in a thoroughly workman- "like manner and to my entire satisfaction. The enclosed "postcard(s) are to be sent to me on commencement and/or com- "pletion of the work. All goods to be dispatched to: Burbage "Secondary Modern School. Erection as per plans and bills of "quantities. See letter attached."

None of the officers of the council at any time called the attention of the company to the fact that the period for completion to be included in the contract differed by a whole year from the period specified in the tender. Neither Smith nor Thornton considered that he was under any obligation to call the attention of the company to that change in the date for completion under the contract. Collins admitted in evidence that it would have been better to do so, as did one Hirst, then an assistant architect to the council.

On March 17, 1954, the clerk to the council wrote to the company enclosing a form of contract in respect of the proposed work. That document, which was the document sought to be rectified in the action, was, so far as material, in the following terms: " Articles of agreement made . . . the 12th day of April, 1954, be-" tween the Leicester County Council . . . (hereinafter called ' the " ' employer ') of the one part and A. Roberts and Co. Ltd. . . . " (hereinafter called ' the contractor ') of the other part. Where-" as the employer is desirous of erecting a secondary modern " school (hereinafter called ' the works ') at Burbage, Hinckley, " in the county of Leicester and has caused drawings and bills " of quantities showing and describing the work to be done to be " prepared by or under the direction of Tom Anderson Collins, " A.R.I.B.A. . . . (hereinafter referred to as ' the architect ') And " whereas the said drawings numbered one to fourteen inclusive " (hereinafter referred to as ' the contract drawings ') and the said " bills of quantities have been signed by or on behalf of the " parties hereto: Now it is hereby agreed as follows: 1. For the " consideration hereinafter mentioned the contractor will upon " and subject to the conditions annexed hereto execute and com-" plete the works shown upon the said drawings and described " by or referred to in the said bills of quantities and conditions. " 2. The employer will pay to the contractor the sum of " £138,399 9s. 3d. (hereinafter referred to as ' the contract sum ') " or such other sum as shall become payable hereunder at the " times and in the manner specified in the said conditions. " 3. The term ' the architect ' in the said conditions shall mean the " said Tom Anderson Collins."

There followed 27 conditions which were in a common form and an appendix by reference to certain of the conditions which included the words: " Date for possession: March 25, 1954. Date " for completion: September 30, 1956."

On or about March 24 the common seal of the company was affixed to this document in the presence of Frank Johnson and E. B. Cruse, as directors, and A. D. Munrow, as secretary, of the company. At all relevant times, including the date when the seal was so affixed, the two directors and the secretary were under the belief that the period for completion specified in the contract was 18 months. Munrow failed to notice that the date specified was 1956 and not 1955, and the directors did not at this stage read the contract. None of the three officers of the company discovered until a much later time the date in fact specified in the contract.

The contract was returned by the company to the council on March 25, but the council did not execute the contract for over a fortnight. Before such execution two important meetings took place. On March 30 there met first at the council's architect's office and later on the building site Smith, Hirst, Cruse, Mottram (then area control manager of the company) and one Corby (then area manager of the company). A number of matters concerning the building project were discussed, including the preparation of a progress schedule for the erection of the building. Cruse mentioned an 18-month period, but was probably referring to the period in which the company hoped to complete rather than to the period for completion mentioned in the contract. Corby said he intended to finish the work in 18 months. Smith warned Corby that he did not think the company would be able to complete in 18 months.

On April 1 Corby wrote to the county architect a letter opening with the following paragraphs: " We confirm the meeting at " your office and on site on March 30, between Mr. Smith and " Mr. Hirst, Mr. E. B. Cruse (technical director), Mr. Mottram " and the writer. We take this opportunity of thanking you for " the courteous reception accorded to our representatives, and " record the following points discussed: 1. Progress schedule. " We are to prepare a draft progress schedule for the work, to be " the basis of a further meeting to be arranged later this week by " telephone, for Monday, next, April 5. 2. Nominated sub-con- " tractors. You will give us as far as possible on Monday next, " a list as complete as possible of the nominated sub-contractors " you desire to appoint, in order that we may arrange a co- " ordinated programme with them."

On April 5 there met at the council's architect's office Smith, Hirst, Mottram and Corby, together with two representatives of Gleeds and Partners, the quantity surveyors nominated by the council's architect. At that meeting there was a further discussion as to the programme for the execution of the works. Mottram produced a progress schedule prepared by him then in draft form and subsequently printed in the form of a document. That document showed a period of 72 weeks for the completion of the works. Mottram testified positively that Smith saw that document at this meeting and said that Smith and Hirst themselves mentioned 72 weeks. Corby testified to the same effect rather

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more cautiously. Their evidence was borne out by that given on commission by Hirst. The two representatives of Gleeds did not remember seeing a progress schedule. Smith denied that he saw the progress schedule on this occasion. His Lordship held that the letter dated April 1 and the inherent probabilities strongly indicated that a progress schedule would be produced on April 5, and was satisfied that Smith's recollection on this point was at fault, and that Smith saw the progress schedule at this meeting. In the course of the discussion Mottram and perhaps also Corby made it clear that the company intended to complete within the 72 weeks. Hirst also said: " What was clear to me " was the fact that they were going to get the job done in 18 " months." The discussion was largely concerned with the sub-contractors whose work had to be fitted in with that of the company, and timing was a matter of major concern.

On April 12 the council executed the contract. Work on the building then began. One Lucking, a surveyor employed by the company, prepared applications for interim monthly certificates under the contract and submitted those to one of Gleeds' representatives who informed Lucking that the period for completion under the contract was 30 months, and upon that information he prepared the first two certificates accordingly. He was then informed by someone in the company's office that the period for completion under the contract was 18 months. He prepared all subsequent certificates on this basis. The company encountered various difficulties with the sub-contractors nominated by the council, and in the event was unable to complete the work till a date early in 1956.

In February, 1955, the directors of the company learned that the council was working a 30-month period for completion, and on February 28 Corby wrote to the council's architect as follows: " We are very concerned to discover that there would appear to " be a clerical error on the form of contract for the above, in " that the date for completion is given as September 30, 1956, " instead of September 30, 1955, which is the correct date. You " will find that our tender dated March 8, 1954, undertook the " completion of the works within 78 weeks of the date of instruc-" tions to proceed. We received your Official Order No. " C.A./A.2623 dated March 12, 1954, instructing us to execute " the works in accordance with our tender, under cover of a letter " dated March 13, 1954, wherein it stated that it is imperative " that the work be commenced as near as possible to March 25, " 1954, and in any case not later than March 31, 1954. In all "these circumstances we shall, therefore, be glad if you will kindly "arrange for the date on the contract documents to be corrected "and initialled by the parties."

A meeting was held on March 2 between the representatives of the council and of the company and certain others. Collins made a note of this meeting, and on March 9 wrote to the company as follows: "With reference to your letter of February 28, "I cannot see that any useful purpose would be served by altering the contract date at this juncture. There is no objection to "your completing the work much earlier than the date stipulated. "For your information, I enclose a note of our conference on "March 2, when the above question, inter alia, was discussed."

In November, 1958, the first plaintiff commenced an action against the council claiming rectification of the contract by the insertion therein of September 30, 1955, in place of September 30, 1956, for the date for completion, damages for breach of contract, alternatively £15,437 2s. 10d. being money due to the company in accordance with the terms of the contract and costs. On April 18, 1961, the case came before Pennycuick J. on the issue of rectification only when leave was given to the first plaintiff to add the company as a plaintiff.

J. Stuart Daniel Q.C. and *A. J. Butcher* for the plaintiffs. The company's revised tender of March 8, 1954, should be construed as a whole as a document offering to carry out the work for £138,399 9s. 3d. within 78 weeks of instructions to proceed, and the letter of March 13, 1954, and the official order enclosed therewith accepted that offer. If that submission is accepted and it is held that September 30, 1956, as opposed to September 30, 1955, was inserted in the contract by a common mistake, then the classic case for rectification, i.e., a prior concluded agreement which has been incorrectly reduced into writing by a mistake of both parties, is made out. There is, however, no need to establish a prior concluded agreement in order to succeed in a claim for rectification: see Kerr on Fraud and Mistake, 7th ed., p. 558. If there is a common intention that certain terms shall be put into the contract, and the contract, by an error, does not fulfil that intention, the court will rectify the contract. There was a common intention to be gathered from the documents that the contract should be for £138,399 9s. 3d. and should be performed within 78 weeks.

If, however, there was no mistake on the council's part and the later date was inserted in the contract by them intentionally, there was a mistake on the part of the company alone. It is submitted that the council was aware of the company's mistake and, therefore, cannot be heard to say that it was not mistaken also. If A states the terms upon which he is prepared to contract and B signifies that he accepts those terms and subsequently B alters the terms to the disadvantage of A and executes the contract in the knowledge that A has overlooked the alteration, B will not be allowed to say that his intention was not the same as A's: *George Cohen, Sons & Co. Ltd.* v. *Docks and Inland Waterways Executive*[1]; *Whiteley* v. *Delaney*[2]; Kerr on Fraud and Mistake, 7th ed., p. 553; Pollock on Contracts, 13th ed. (1950), p. 422.

J. L. Arnold Q.C. and *D. A. Thomas* for the council. Rectification can be obtained only if the plaintiff shows (A) that his intention was that the term sought to be introduced by rectification should be included in the instrument sought to be rectified and that he was prepared to contract and prepared to contract only on the basis that that term was included; and (B) either (1) that the defendant's intention was that the same term should be included, or (2) that the omission of the term was occasioned by the dishonest conduct of the defendant. That dishonesty may take one of three forms, (a) a false representation that the instrument proffered for execution did in fact contain the term, or (b) some other false representation the making of which caused the instrument not to contain the term which but for that false representation it would have contained, or (c) the acceptance by the defendant of the formation of the contract without the term in the knowledge that the plaintiff thought that the term was included. The plaintiffs have pleaded A and, as alternatives, B (1) and B (2) (c). The plaintiffs have not pleaded B (2) (a) or B (2) (b), and the facts would not support such a plea. *Whiteley* v. *Delaney*[2] is a B (2) (b) case. The statement in Kerr on Fraud and Mistake, 7th ed., p. 555, referring to *Cohen's* case,[3] is inaccurate and has no authority because it appears for the first time in the present edition, the editors of which are both still living. The principle on which the court grants rectification in a B (2) (c) case is stated in Snell's Principles of Equity, 25th ed. (1960), p. 569.

In *Cohen's* case[4] there was no oral evidence of the intention of the defendants. The judge found that the defendants' intention was to be determined wholly from the documents. It was said, and this is what *Cohen's* case [5] decided, that, in a case where the evidence as to intention must be derived from the documents, the parties' intention will be taken to be what the documents on their true construction mean. That has no relevance to a case such as the present where there is oral evidence as to the intention of the parties. In *Cohen's* case [5] Lord Evershed M.R. said [6] that to found a claim for rectification there must be common mistake or fraud on the part of the defendant. He also said, obiter,[7] that a party cannot be heard to say that although the documents on their true construction mean one thing they in fact mean something else. *Cohen's* case [8] was considered in *North Thames Gas Board* v. *Sunbury-upon-Thames Urban District Council.*[9] *Blay* v. *Pollard* [10] emphasises the need to establish fraud on a claim for rectification based on a unilateral mistake and shows that, where there is an antecedent oral agreement followed by a formal document in a different form, the court is not bound to find a common mistake even if there were no further negotiations between the oral agreement and the execution of the formal document. *Smith* v. *Hughes* [11] also supports the council's view of the law as to rectification. Knowledge of the other party's mistake is an essential ingredient in a claim for rectification under B (2) (c).

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[1] (1950) 84 Ll.L.R. 97, C.A.

[2] [1914] A.C. 132, H.L.

[3] 84 Ll.L.R. 97.

[4] (1949) 83 Ll.L.R. 22; 84 Ll.L.R. 97.

(A) The plaintiffs must prove beyond peradventure that the company had the intention to contract and to contract only on the basis of an 18-month period for completion. They have not offered one word of evidence to that effect. The court must be satisfied by evidence, not by inference, that the company's intention was to contract on an 18-month basis. There is no evidence to show that the company would not have signed the contract whatever the date for completion, provided it was a date before which it could complete the works. The plaintiffs must show that it was a matter of importance to the company what date for completion was inserted in the contract and that it would not have executed a contract which it knew did not contain the period for completion specified in the revised tender. By submitting its first tender dated January 30, 1954, without a date for completion, the company was courting the acceptance of a tender containing no date for completion. It is submitted that the company thought that it would be able to complete the works within 18 months and was indifferent to what period was written into the contract, and has, therefore, failed to prove that its intention was to contract only on the basis of an 18-month period for completion.

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[5] 84 Ll.L.R. 97.
[6] Ibid. 103.
[7] Ibid. 107.
[8] 84 Ll.L.R. 97.
[9] Unreported, June 14, 1955, C.A.
[10] [1930] 1 K.B. 628, C.A.
[11] (1871) L.R. 6 Q.B. 597, D.C.

(B) (1). The plaintiffs must show that the council intended that a period for completion of 18 months should be inserted in the contract. On the evidence, the relevant officials of the council, Collins, Smith and Thornton, intended to put a period for completion of 30 months in the contract. The intention of the council is to be inferred from the acts of its officers. It is not correct to say that the only acts from which the intention of the council can be inferred are those of the tenders sub-committee. The sub-committee never in fact considered the revised tender. If, which is not admitted, Collins was acting in excess of his authority in inserting the 30-month period for completion in the contract without referring the matter to the sub-committee, his actions were ratified by the affixing of the council's seal to the contract (see *Firth* v. *Staines* [12]) and thus became acts capable of exhibiting the intention of the council.

It may be said that, although there was no acceptance of the revised tender by the sub-committee, the letter of March 13, 1954, contained a representation that the revised tender had been accepted by the sub-committee and that that estops the council from showing that in fact there was no such acceptance. It is submitted that, on its true construction and having regard to the surrounding circumstances, the letter of March 13 contained no such representation. On February 5, 1954, the sub-committee accepted the first tender for £165,910, which contained no period for completion, subject to the price being reduced by negotiations to a figure within the authorised amount. That was a conditional acceptance. The price was reduced and, at that moment, the conditional acceptance became an unconditional acceptance at the reduced price. Even if the letter of March 13 did contain a representation that the revised tender had been accepted by the sub-committee, the plaintiffs cannot rely on the doctrine of estoppel because they are plaintiffs and estoppel in pais is a weapon which a defendant but not a plaintiff can use. Further, there is no evidence that the company placed any reliance on the representation that the sub-committee had accepted the revised tender. Without such reliance the plaintiffs cannot, in any event, rely on estoppel in pais. The council is not, therefore, estopped from proving that the sub-committee never accepted the revised tender. The right conclusion is that, when the contracts were exchanged, it was the council's intention, to be inferred from the acts of its officers, to include a 30-month period for completion in the contract. There was, therefore, no common mistake upon which the plaintiffs can found a claim for rectification.

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[12] [1897] 2 Q.B. 70; 13 T.L.R. 394.

(B) (2) (c). The plaintiffs must establish (1) that the council knew that the company mistakenly thought that an 18-month period for completion had been inserted in the contract; (2) that the council's failure to point out to the company its mistake was dishonest, and (3) that the failure to point out the mistake was the reason why the contract was concluded in the form in which it was concluded. In the present case, if the council knew that the company had made a mistake, and did not draw its attention to that mistake, that would be dishonest. The only evidence as to the council's knowledge of the company's alleged mistake is that the officers of the council who were concerned with the matter, Collins and Smith, knew at an early stage of the operations on the site that the company hoped to complete the work in 18 months or thereabouts. At its highest, that evidence does no more than suggest that someone in Smith's position might have suspected a mistake on the part of the company and that is not enough. It is submitted that Smith cannot be taken to have known of the company's mistake. It is not conceivable that a man in his position would fail to inform the company of its mistake if he knew of it. Further, Smith had no motive for not so informing the company.

Daniel Q.C. in reply. It is accepted that the plaintiff in a suit for rectification must produce strong evidence. That does not mean, however, that the court is not entitled to draw inferences from the facts if they should be drawn.

(A) There is no need for a plaintiff to show that he was only prepared to contract on the basis that a certain term would be included in the contract. It is enough for the plaintiff to show that it was his intention to contract on the basis of that term being included in the contract. The fact that he was not prepared to contract on any other basis is relevant as showing what his intention was. All the plaintiff has to show, so far as his own intention is concerned, is what that intention was and that he made it known to the other party. The revised tender is conclusive evidence that the company intended to contract on the basis of an 18-month period for completion.

(B) (1). This is one way in which a plaintiff can establish his right to rectification. The revised tender showed upon what terms as to price and time the company was prepared to contract, and the letter of March 13 and the official order accepted that offer. There is, therefore, a clear consensus of opinion and expression of intention by both parties that it was upon that basis that they proposed to contract. There was, therefore, a common mistake in the ordinary sense.

(B) (2). If a plaintiff shows any of (a), (b) or (c), he is entitled to rectification. If there was no common mistake, the present case falls within (B) (2) (c). However, it is not accepted that those three classes of dishonesty are necessarily an exhaustive list of the kinds of dishonesty upon which a plaintiff can base a claim for rectification. There is a third class of case quite different from (B) (1) or (B) (2) in which a plaintiff can obtain rectification, i.e., where the defendant, seeking to gain an advantage, intentionally alters a provisionally agreed obligation without informing the plaintiff that he has done so. In such a case he will be estopped from saying that he did not intend the contract to be in accordance with the provisional agreement. There are, therefore, three classes of case in which a plaintiff will be entitled to rectification, (1) a common mistake, (2) a unilateral mistake coupled with fraud on the part of the defendant, and (3) a mistake on the part of the plaintiff coupled with misconduct by the defendant not amounting to fraud, which justifies a finding of common mistake based on estoppel: see, e.g., *Cohen's* case.[13] The allegations of fraud in *Cohen's* case [14] were expressly negatived by Vaisey J.[15] and by the Court of Appeal.[16] The finding of common mistake by the Court of Appeal was based on two grounds. The first ground was that there was, in fact, a common mistake in the ordinary sense. Since there was some uncertainty as to whether there was a common mistake, there was a second finding [17] in the nature of a stop-gap, but nevertheless a material part of the judgment, that there was a degree of culpability on the part of the defendant which estopped it from denying that there had been a common mistake. The second finding was not obiter but was part of the ratio decidendi of the case. *Whiteley* v. *Delaney* [18] is a similar case in which fraud was not alleged.

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[13] 84 Ll.L.R. 97.

[14] 83 Ll.L.R. 22; 84 Ll.L.R. 97.

[15] 83 Ll.L.R. 22, 34, 35.

[16] 84 Ll.L.R. 97, 102.

[17] Ibid. 111.

[18] [1914] A.C. 132.

It is not only a defendant who can plead estoppel. A plaintiff is entitled to plead estoppel in reply. *Blay* v. *Pollard*[19] was a case in which the court took the view that the plaintiff must establish fraud if he was to succeed, and that since he did not he must fail. It has nothing to do with estoppel. *Smith* v. *Hughes*[20] was a (B) (2) (c) case; applying the rule laid down in that case to the present case, it poses two questions: (1) did the council believe that the company believed that the contract contained a period for completion of 18 months, and (2) did the council believe that the company believed that the council was contracting on the basis of an 18-month period for completion? On the evidence in the present case both those questions ought to be answered in the affirmative. *North Thames Gas Board* v. *Sunbury-upon-Thames Urban District Council*[21] adds nothing to *Cohen's* case[22] except to show that after careful consideration Lord Evershed did not resile from his decision in *Cohen's* case.[22] The facts in the present case are identical, for all practical purposes, with those of *Cohen's* case.[22]

It is submitted, in the alternative, that, by their conduct and correspondence, the council represented to the company that they were contracting on the basis of an 18-month period for completion. The company executed the contract in reliance on that representation and thereby altered their position for the worse. Therefore, the council is estopped from alleging that it intended to contract on the basis of a 30-month period for completion.

Cur. adv. vult.

May 2. Pennycuick J. stated the facts substantially as set out above, observing that the letter from Smith to the company dated March 13, 1954, and the official order enclosed therewith were well calculated to divert the attention of the company from the fact that the period for completion in the contract differed by a whole year from the period specified in the revised tender, and continued: The company claims rectification of the contract upon two alternative grounds, namely: (1) that it was the common intention of the parties that the contract should include a period for completion of 18 months and the period of 30 months was inserted under common mistake; and (2) that the council cannot be heard to say that it was not mistaken as to the date for completion since when it executed the contract it well knew that the company was mistaken as to the date for completion included in the contract, yet stood by and took no step to draw the company's attention to its mistake. The second ground is formulated in full in the reply delivered by the company in this action.

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[19] [1930] 1 K.B. 628.

[20] L.R. 6 Q.B. 597.

[21] Unreported, June 14, 1955, C.A.

[22] 84 Ll.L.R. 97.

Upon the facts as I have stated them it is clear that the council and the company were not at one upon the length of the period for completion intended by them respectively to be inserted in the contract, and, accordingly, the company is not entitled to rectification upon the first ground relied upon by it.

The second ground rests upon the principle that a party is entitled to rectification of a contract upon proof that he believed a particular term to be included in the contract, and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed the term to be included. Mr. Arnold for the council formulated the principle in slightly different terms, as follows, viz., the plaintiff must show that his intention was that the term sought to be introduced by rectification should be included in the contract and (so far as now relevant) that the omission of the term was occasioned by the dishonest conduct of the defendant in acceptance of the formation of the contract without the term in the knowledge that the plaintiff thought the term was included. Mr. Arnold thus introduces into his formulation of the principle the word "dishonest," but he accepts that such conduct by the defendant in his formulation is of its nature dishonest, so that the word "dishonest" appears to carry the matter no further. I do not think that there is any substantial disagreement as to the scope of the principle.

The principle is stated in Snell on Equity, 25th ed. (1960), p. 569, as follows: "By what appears to be a species of equitable "estoppel, if one party to a transaction knows that the instru-"ment contains a mistake in his favour but does nothing to "correct it, he (and those claiming under him) will be precluded "from resisting rectification on the ground that the mistake is "unilateral and not common."

The exact basis of the principle appears to be in some doubt. If the principle is correctly rested upon estoppel it seems to me that it is not an essential ingredient of the right of action to establish any particular degree of obliquity to be attributed to the defendants in such circumstances. If, on the other hand, the principle is rested on fraud, obviously dishonesty must be established. It is well established that a party claiming rectification must prove his facts beyond reasonable doubt, and I think this high standard of proof must equally apply where the claim is based on the principle indicated above.

I have been referred to two recent decisions on rectification in the Court of Appeal, namely, *George Cohen, Sons & Co. Ltd.* v. *Docks and Inland Waterways Executive* [1] and *North Thames Gas Board* v. *Sunbury-upon-Thames Urban District Council.*[2] In the former of these cases the court was concerned primarily, and in the second exclusively, with the question whether on the particular facts there had been such common mistake as to warrant rectification on the primary ground, a question which was answered in the affirmative in the former and in the negative in the latter case. In the former case there was also some discussion upon an alternative ground for rectification germane to the second ground relied upon here, and there was considerable argument before me as to the exact scope of what was said upon this alternative ground.

I have also been referred to a number of other cases in this connection, including *Smith* v. *Hughes* [3] and *Whiteley* v. *Delaney.*[4] For the purpose of the case before me it will be sufficient to rely upon the principle set out above. Nothing in the cases cited throws any doubt upon this principle, and I do not think that I could usefully go further into the law.

Almost at the end of the trial, during his speech in reply, Mr. Daniel, for the company, asked for leave to amend the reply by including certain alternative claims based on a representation alleged to have been contained in the order form dated March 12 and the letter dated March 13. I did not think it right to allow at that stage these amendments, which involved issues of fact and one of which alleged fraud.

Returning to the facts of the present case, the company, as I have held, believed that the 18-month period of completion was included in the contract. The question then is: did the council, when it concluded the contract with the 30-month period, do so in the knowledge that the company believed the 18-month period was included in it? Mr. Arnold accepts that for this purpose the knowledge of the council's officers should be treated as the knowledge of the council. He also accepts that the relevant officers are Collins and Smith, and that the county clerk, who drew the contract on their instructions as transmitted by Thornton, may be left out of account.

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[1] (1950) 84 Ll.L.R. 97, C.A.

[2] Unreported, June 14, 1955, C.A.

[3] (1871) L.R. 6 Q.B. 597, D.C.

[4] [1914] A.C. 132, H.L.

I do not think that, on the evidence, either of the officers concerned, that is Collins and Smith, could properly be held to have had knowledge of the company's belief in the 18-month period during the interval between the dispatch on March 17 of the contract specifying the 30-month period and the meeting on March 30. The point then narrows itself to the knowledge of Smith as the result of the meetings held on March 30 and April 5. Do the facts raise beyond reasonable doubt the inference that by the end of the latter meeting Smith knew that the company was under the belief that the period of completion under the contract was 18 months?

I proceed to summarise the facts relevant to the state of Smith's knowledge by the end of the meeting on April 5: (1) He knew that under the revised tender the company had agreed to complete the works within 78 weeks of instructions to proceed; (2) as an experienced architect he must have appreciated that the price under the tender was related to the period for completion, and that if the period had been longer the price would probably have been higher; (3) he had discussed the period for completion with Collins and on the latter's instructions had, through Thornton, instructed the council's clerk to include in the contract 30 months as the period for completion; (4) he had taken no steps to call the attention of the company to the inclusion of 30 months as the period for completion instead of 18 months; (5) he had been told by Cruse and Corby on March 30 that the company aimed to get the work finished in 18 months, and had told Corby he did not think this would be possible; (6) he had been shown by Mottram on April 5 the progress schedule showing a period of 72 weeks for completion of the work, and had been assured by Mottram, and perhaps also by Corby, that the company intended to complete in that time; (7) as an experienced architect, he could not fail to appreciate that 72 weeks for completion in the progress schedule was appropriate to an 18-month period for completion under the contract, and inappropriate to a 30-month period for completion under the contract; (8) Mottram and Corby made no comment on what, if they believed the period for completion under the contract to be 30 months, must have seemed to them a startling anomaly.

In my judgment, these facts raise beyond reasonable doubt the inference that Smith did know at latest by the end of the meeting on April 5 that the company believed the period for completion under the contract to be 18 months. Only if he was unusually stupid or unusually heedless could he have failed to understand the company's state of mind at least by the end of this meeting. I am satisfied he was neither stupid nor heedless, and it seems to me he did realise the company's mistake. It is contended that it would be inconceivable for an official of Smith's position, if he did realise the company's mistake, to stand by without bringing it to the company's notice; but after hearing Smith's evidence, and in particular his views upon the propriety of inserting a new date for completion in the contract without communication with the company, I am unable to attribute any weight to this argument.

It is also contended that Smith had no motive for acting as he did. No one suggests that he had any corrupt personal motive, but, as a loyal officer of the council he must have recognised that it would be extremely inconvenient if the contract were to go off, bearing in mind that work under it must begin by the end of March, 1954, in order to qualify for the Ministry grant.

As I have said, this issue appears to me to depend upon the state of Smith's knowledge, and I do not feel myself concerned either to criticise or to excuse his conduct.

I propose, accordingly, to order that the contract be rectified by the insertion of September 30, 1955, in place of September 30, 1956, as the date for completion.

Order accordingly.
Defendant to pay the plaintiffs' costs of this issue.

Solicitors: *Sydney Redfern & Co.; Kingsford, Dorman & Co. for John A. Chatterton, Leicester.*

V. A. M.

1961
March 3;
June 22.

Buckley J.

In re SEALE'S MARRIAGE SETTLEMENT.

[1960 M. No. 214.]

Trusts—Variation—Act of 1958—*Revocation of English trust—Transfer of funds to substantially identical Canadian trust—Jurisdiction—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

By a marriage settlement made in 1931 certain investments were settled on trust for the wife for life, after her death on trust for the husband for life upon protective trusts if he survived her, and after the death of the survivor on trust for the children or remoter issue of the marriage as the husband and wife jointly or the survivor of them should appoint, and in default of such appointment to the children of the marriage who, being male, attained the age of 21 years, or, being female, attained that age or married, if more than one in equal shares.

At the date of the settlement the husband and wife were domiciled in England but they subsequently emigrated to Canada. There were three children of the marriage, one of whom had attained the age of 21 years.

On a summons asking the court to appoint a Canadian corporation to be trustee of the settlement in place of the present English trustee and to approve, under section 1 of the Variation of Trusts Act, 1958,[1] an arrangement whereby the trustee of the English settlement might transfer the property comprised in that settlement to the trustee of a Canadian settlement which was as similar to the English settlement as possible:—

Held, that, having regard to the fact that the court could approve an arrangement revoking all the trusts of a settlement, the court had jurisdiction to approve an arrangement, such as the present, which, in effect, revoked all the trusts of the English settlement in the event of the trust property becoming subject to the trusts of a settlement which would be recognised and enforced by some other jurisdiction.

In re Liddiard (1880) 14 Ch.D. 310 considered.

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[1] Variation of Trusts Act, 1958, s. 1: "(1) Where property, whether "real or personal, is held on trusts "arising, whether before or after the "passing of this Act, under any will, "settlement or other disposition, the "court may if it thinks fit by order "approve on behalf of—(*a*) any person having, directly or indirectly, "an interest, whether vested or contingent, under the trusts who by "reason of infancy or other incapacity "is incapable of assenting, or . . . "(*c*) any person unborn, or (*d*) any "person in respect of any discretionary interest of his under protective "trusts where the interest of the "principal beneficiary has not failed "or determined, any arrangement (by "whomsoever proposed, and whether "or not there is any other person "beneficially interested who is capable of assenting thereto) varying "or revoking all or any of the trusts, ". . . Provided that except by virtue "of paragraph (*d*) of this subsection "the court shall not approve an "arrangement on behalf of any person unless the carrying out thereof "would be for the benefit of that "person."

ADJOURNED SUMMONS.

By a marriage settlement, dated March 6, 1931, of which Midland Bank Executor and Trustee Co. Ltd. (an English company) was trustee, certain investments were settled on trust to pay the income thereof to the wife, Mildred Margaret Boutflower Murray, during her life, and after her death to hold the income upon protective trusts for the husband, Walter Murray, if surviving during his life, and after the death of the survivor of the husband and the wife the capital and future income of the trust fund were to be held in trust for all or any of the children or remoter issue of the marriage in such shares and manner in all respects as the husband and wife should by deed or deeds, revocable or irrevocable, jointly appoint, and in default of and subject to any such appointment as the survivor of them the husband and wife should in like manner or by will or codicil appoint, and in default of and subject to any such appointment in trust for all or any the children or child of the marriage who, being male, attained the age of 21 years, or being female, attained that age or married, and if more than one in equal shares.

There were three children of the marriage, Jill Elizabeth Murray, who had attained the age of 21 years before the issue of the summons, and Deborah Susan Murray and John Alexander Murray, who were both infants. At the date of the marriage the husband and wife were domiciled and resident in England, but they had since emigrated to Canada where they resided and were domiciled at the date of the summons, and where they intended thereafter to reside and be domiciled.

The evidence disclosed that the present state of affairs gave rise to various practical difficulties and financial disadvantages for those interested under the settlement. The income which the wife derived under the settlement from some Canadian investments had for some years suffered double taxation. The fact that the trustee was English had prevented double taxation relief being available. The parties were advised that on the wife's death English death duties would be payable not only on settled property which might then be in England but also on Canadian investments, whereas English death duties would not be payable on Canadian investments if the settlement were Canadian. Other disadvantages due to double taxation and exchange control restrictions might arise in the future so long as the settlement was English, and variations in exchange rates might make it unfortunate that some of the property was invested in England.

The parties considered that it would be more convenient that the trustees should be in Canada so that the beneficiaries might have easy access to them.

In those circumstances, a Canadian lawyer was asked to prepare a draft of a settlement in terms appropriate to the law of Quebec bearing the closest possible similarity to the trusts of the original settlement. That lawyer prepared the draft and deposed to the fact that, before preparing it, he was supplied with a copy of the English settlement, and that his instructions were so to draft the Canadian settlement that it would not alter the beneficial interests of the persons interested unless the law of Quebec should make such alterations necessary. He said that the draft carried out those instructions to the best of his ability, and the settlement which he had prepared would not alter the beneficial interests except in the following respects. The law of Quebec did not recognise protective trusts and it had, therefore, been necessary to substitute a straightforward life interest in favour of the husband in reversion expectant on the death of his wife for the protected life interest which he was given by the English settlement. The Canadian settlement contained a clause (clause 7) which provided that all sums received by the husband and the other persons interested under the settlement should not be subject to seizure of such interest by creditors, and should not be capable of being anticipated or assigned without the consent of the trustee of that settlement. The Canadian lawyer also deposed that the clause in question was usually included in settlements under the law of Quebec and that, in his opinion, it was desirable in the interests of the beneficiaries to include it in the Canadian settlement. The Canadian settlement was drawn on the footing that the Chartered Trust Co., a corporate body incorporated according to the law of the Province of Ontario, would become or be the trustee of the Canadian settlement. That company had accorded its consent in writing to be trustee also of the English settlement and had indicated what fees it would require to be paid in its capacity as trustee of the Canadian settlement.

The originating summons, dated January 26, 1960, asked (as amended) that the Chartered Trust Co. might be appointed trustee of the English settlement and that the court should approve an arrangement, set out in the schedule to the summons, whereby the trustee of the English settlement might transfer the funds comprised in that settlement (or the proceeds of sale thereof) to the trustee of a new settlement to be constituted under the law of the Province of Quebec to be held on the trusts of the new settlement, freed and discharged from the trusts of the existing settlement, provided that the new settlement should be in substantially the form of the draft settlement mentioned above.

J. W. Brunyate for the applicants, the husband and the wife and their adult daughter. Having regard to the Variation of Trusts Act. 1958, it is now possible for the court to authorise the trustees of an English settlement to transfer the whole of the funds subject to that settlement to a new foreign settlement. In the present case the beneficial trusts of the Canadian settlement are the same as those of the English settlement except that the interest of the husband is an ordinary life interest, because protective trusts are not known to Canadian law. The administrative provisions in the Canadian settlement are those which the Canadian lawyer who drafted the settlement considered proper to be included in a Canadian settlement.

The court has always had power to appoint foreign trustees of an English settlement in a proper case: see Lewin on Trusts, 15th ed. (1950), p. 427; *In re Freeman's Settlement Trusts* [2]; *In re Liddiard* [3]; *In re Simpson* [4]; *Meinertzhagen* v. *Davis.*[5] That was not an entirely satisfactory procedure, because, since the trustees were foreign and the trust funds might be taken out of the jurisdiction, the English court might have difficulty in enforcing the trusts of what remained an English settlement. Also it might be difficult to enforce the trusts of such a settlement in a foreign court which would not be a very convenient forum for administering an English trust. Further, whenever a trust is connected with two countries, there is a risk of double taxation and English death duties may be chargeable on trust property situated abroad by reason of the trust's connection with this country. It would be much more convenient if the court could revoke the English trusts and authorise the transfer of the trust funds to a foreign settlement.

The court has power under section 1 of the Variation of Trusts Act, 1958, to vary the trusts of the English settlement by authorising the transfer of the trust funds to the Canadian settlement. The effect of such a variation would, incidentally, revoke the whole of the existing trusts. That is something which the court has power to do under section 1 of the Act.

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[2] (1888) 37 Ch.D. 148.

[3] (1880) 14 Ch.D. 310.

[4] [1897] 1 Ch. 256, C.A.

[5] (1844) 1 Coll. 335.

P. G. Clough for the infant respondents. This is an arrangement which the court has jurisdiction to approve; it is beneficial to the infants and ought to be approved on their behalf. The object of the arrangement is to obtain tax, administrative and other advantages, all of which are beneficial to the infants, whose interests under the Canadian settlement are the same as their interests under the English settlement except that the English settlement contains no clause analogous to clause 7 of the Canadian settlement. The provision in clause 7 preventing seizure of a beneficiary's interest by his creditors is clearly beneficial to the infants. The provision against anticipation or assignment fetters the beneficiaries' power to deal with their interests to a certain extent, but it will not deprive them altogether of their power to deal with their interests, for they may do so with the consent of the trustees which, it is submitted, could not be unreasonably withheld. Further, the retention in the Canadian settlement of a power of advancement to some extent mitigates the effect of clause 7. The arrangement, as a whole, is beneficial to the infants and should be approved on their behalf.

J. A. Brightman Q.C. for the trustee of the English settlement. The court has jurisdiction to approve an arrangement which, in effect, substitutes foreign trusts for English trusts. The Variation of Trusts Act, 1958, gives the court power to revoke all the trusts of an existing settlement and it follows that the court has power to take the lesser step of revoking the trusts of an English settlement on terms that the trust funds are subjected to similar foreign trusts.

The objects of the discretionary trusts under the husband's protected life interest are (in addition to the husband himself) the issue of the marriage, a future wife of the husband and the issue of a future marriage of his. It is not necessary that the arrangement should be for their benefit. The wife was the settlor and probably did not intend to benefit a future wife and children of her husband.

As regards clause 7 of the Canadian settlement, it may be that it is not necessary to impose these restrictions upon the persons interested in the capital of the trust fund. It might be convenient to refer the matter back to the Canadian lawyer who drafted the Canadian settlement for further consideration.

BUCKLEY J. stated the facts, substantially as set out above, and continued: Under section 1 of the Variation of Trusts Act, 1958, the court has jurisdiction where property is held on trust under any will or settlement or other disposition to approve on behalf of the various classes of persons mentioned in the section any arrangement varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trust. So far as I am aware this is the first case in which that jurisdiction is invoked for the purpose of converting an English trust into a trust governed by some other system of law. If it were merely a question of varying the trusts, it seems to me there might be difficulty in saying that this court could properly vary the trusts under the settlement by substituting trusts of a kind which would fall to be administered by some other law; but, having regard to the fact that the court can approve an arrangement which revokes all the trusts of the settlement, it seems to be clear that the court must have jurisdiction to approve an arrangement which, in effect, does revoke all the trusts of the English settlement in the event of the trust property becoming subject to the trusts of a settlement which would be recognised and enforced in some other jurisdiction. It seems to me I have jurisdiction to approve a scheme on the lines of the scheme I am asked to approve in the present case.

The evidence establishes to my satisfaction that the husband and the wife intend to continue to live in Canada, that their children who are living in Canada and have been brought up as Canadians are likely to continue to live in Canada, and that it will be for the general advantage of all the beneficiaries that the administrative difficulties and the difficulties of other kinds which result from the fact that it is an English settlement and the beneficiaries all reside in Canada should be brought to an end; and I am satisfied that the arrangement is sensible and advantageous for all concerned.

The only aspect I feel some doubt about is whether it is right for me to approve the transfer of this fund into Canadian trusts which contain quite such stringent provisions against anticipation as are contained in clause 7 of the draft Canadian settlement because, whereas under the English settlement any child or remoter issue of the husband and wife who became entitled to a vested interest in reversion in any part of the capital could assign or deal with that interest in any way in which he thought fit, it appears from clause 7 of the Canadian draft as though by that clause he would be deprived of that right unless he obtained the consent of the trustees and, before I finally part with the matter,

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Buckley J.

I would like to be satisfied that that is a provision which under Canadian law will really be advantageous to persons who may ultimately become entitled to the capital of this trust, or whether the clause might not be modified in some way which will maintain the comparison between the protective trust imposed on the husband by the English settlement without restricting the interests of the persons who may ultimately become entitled to capital.

I have been referred to a number of authorities, all decided long before the Variation of Trusts Act, 1958, was thought of, dealing with the question whether it is right and, if so, in what circumstances to appoint foreign trustees of an English trust. I find some comfort for the course I am proposing to adopt in *In re Liddiard.*[1] That was a case under the will of an English testator and the residue of his estate was divisible among his children and issue, some of whom were infants. All of them were resident in Australia and application was made to the court to appoint two persons as trustees who were resident in Australia, and who would sell the English investments and invest the money in Australia. Malins V.-C. thought that that was a proper order to make and he made it. The facts of that case were not unlike the present. It is easier for me to make the present order than it was for Malins V.-C. to make the order in *In re Liddiard,*[1] because the trust in that case remained an English trust. It was an English trust of which the trustees and all the assets were proposed to be situate outside the jurisdiction and it has, in general, been the attitude of this court that, in the case of an English trust, the court is unwilling to appoint trustees in such a way that all the trustees are out of the jurisdiction, more particularly if the property is likely to be taken out of the jurisdiction. In the present case I am asked to do something which will not result in that rather unsatisfactory state of affairs because if the arrangement is carried into effect, the English trusts will cease to have any operative effect because all the funds will become free from the trusts of that settlement and will be caught by the trusts of the Canadian settlement. The assets will presumably be transferred to Canada, the trustee will be in Canada and the proper court for enforcing the trust will be the competent court in Quebec, so there will not be that divorce of the assets and the trustees from the jurisdiction to enforce the trusts which would have resulted from what was done in *In re Liddiard.*[1] I am.

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[1] (1880) 14 Ch.D. 310.

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therefore, prepared in principle to approve the arrangement subject to further investigation about clause 7 in the proposed Canadian settlement. Any order I make will have to be post-dated, but I will be prepared to appoint the Chartered Trust Co. trustee of the English settlement.

June 22. BUCKLEY J. approved the arrangement with an amendment whereby the provision in clause 7 of the draft Canadian settlement that any sums paid under the settlement to any beneficiary should not be capable of being anticipated or assigned without the consent of the trustee of that settlement was restricted so as to apply only to any sums paid to the husband.

Order accordingly.
Costs and expenses of the trustee on the trustee basis, and costs of the other parties on the common fund basis to be paid out of the trust fund before transferring such funds to the new trustee appointed by the order.
A note of the order to be endorsed on the settlement.

Solicitors: *Merrimans for Barton, Thompson & Hitchins, Bournemouth.*

V. A. M.

In re ROYAL VICTORIA PAVILION, RAMSGATE. WHELAN *v.* F.T.S. (GREAT BRITAIN) LTD.

1961
June 19, 29.

Pennycuick J.

[1961 T. No. 541.]

Restrictive Covenant—Land, whether binding—Covenant "to procure" non-user—No express provision that covenant not made by vendor on behalf of successors and assigns—Whether personally binding on assignee of vendor—Whether "contrary intention" expressed—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 79 (1).

By a conveyance dated July 7, 1952, vendors, the lessees of a seaside pavilion with an unexpired term of seventeen years due to expire on March 25, 1969, conveyed to the defendant company two freehold properties in the town in which the businesses of

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theatres and cinemas were carried on and assigned to the company two leasehold properties also in the town, in which the business of a theatre, a cinema and a licensed hotel were carried on, together with the goodwill of all the businesses. By clause 4 of the conveyance the defendants entered into a covenant for themselves and their successors and assigns and by clause 6 the vendors entered into a purely personal covenant. By clause 5 the vendors covenanted with the purchasers that they would procure that until March 25, 1969, the pavilion would not be open to the public between September 30 in each year and the succeeding Whit-Saturday (both days inclusive) except for entertainment by living actors for one performance each month, save with the purchasers' written consent, or be used at any other time for public entertainment by any other medium than living actors. The restriction was registered as a class D (ii) land charge.

An assignee of the vendors sought a declaration that the covenant in clause 5 was not binding on him or any other leaseholder of the pavilion, alternatively, a declaration whether and by whom the covenant was enforceable, and that the entry in the register might be cancelled, and the defendants relied, inter alia, on section 79 of the Law of Property Act, 1925 [1]:—

Held, (1) that the word "procure," which could be paraphrased as "see to it," was appropriate to denote a personal obligation to ensure, and a covenant so expressed was naturally to be regarded as of a personal character and was inappropriate where successors in title were intended to be bound; and that, having regard also to its context and to the length of the term, the covenant in clause 5 was a personal covenant by the vendors.

(2) That the covenant in clause 5 was not deemed to be made by the covenantor on behalf of himself and his successors in title under section 79 (1) of the Law of Property Act, 1925, for, although it contained no express provision to the effect that it was not made on behalf of successors in title, there was sufficient indication in the wording and context of the instrument to satisfy the requirement of the exception "unless a contrary intention is "expressed." The vendors' assignee was, therefore, entitled to a declaration that the covenant was not binding on him or any other leaseholder of the pavilion and the entry in the register should be cancelled.

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[1] Law of Property Act, 1925, s. 79: "(1) A covenant relating to any "land of a covenantor or capable "of being bound by him, shall, "unless a contrary intention is "expressed, be deemed to be made "by the covenantor on behalf of him-"self his successors in title and the "persons deriving title under him or "them, and, subject as aforesaid, "shall have effect as if such succes-"sors and other persons were "expressed. This subsection extends "to a covenant to do some act "relating to the land, notwith-"standing that the subject-matter "may not be in existence when the "covenant is made. (2) For the "purposes of this section in connec-"tion with covenants restrictive of "the user of land 'successors in "'title' shall be deemed to include "the owners and occupiers for the "time being of such land."

Broomfield v. *Williams* [1897] 1 Ch. 602; 13 T.L.R. 278, C.A., and *Gregg* v. *Richards* [1926] Ch. 521, C.A. applied.

Held, further, that the covenant had been taken for the protection of the properties comprised in the conveyance viewed as land and not for the protection of the purchasers' businesses and would have been capable of running with the land.

Newton Abbot Co-operative Society Ltd. v. *Williamson & Treadgold Ltd.* [1952] Ch. 286; [1952] 1 T.L.R. 283; [1952] 1 All E.R. 279 followed.

ADJOURNED SUMMONS.

The following statement of the facts is taken substantially from the judgment of Pennycuick J. By a lease dated September 26, 1936, the Ramsgate Corporation demised a property known as the Royal Victoria Pavilion at Ramsgate to one Harry Edward Bawn for 21 years from March 25, 1934. By an assignment dated September 28, 1936, Bawn assigned the lease to Balexcro Theatres Ltd. By a lease dated April 7, 1947, Ramsgate Corporation demised the Pavilion to Balexcro Theatres Ltd. for a further 14 years from March 25, 1955, On August 28, 1950, Balexcro Theatres Ltd. changed its name to Thanet Theatrical Enterprises Ltd. ("Thanet Theatrical").

By a conveyance dated July 7, 1952, Thanet Theatrical, which at that date had thus a lease of the Pavilion with an unexpired term of 17 years due to expire on March 25, 1969, conveyed and assigned to the defendant company, F.T.S. (Great Britain) Ltd. (then known as Predominant Film Transport Ltd.), four other properties in Ramsgate, namely, the King's Theatre and the Ramsgate Picture House, which were freehold, and the Palace Theatre and Sangers Hotel and Restaurant, which were leasehold.

The conveyance, after recital of the vendors' seizure of the various properties, recited as follows: "(7) The vendors have for "some time past carried on upon the freehold premises described "in the first and second schedules hereto the businesses of "theatres and cinematograph theatres and upon the leasehold "premises described in the third schedule and part II of the "fourth schedule hereto the business of a theatre and cinema and "upon the leasehold premises described in part I of the fourth "schedule hereto the business of a licensed hotel or inn. (8) The "vendors have agreed with the purchasers for the sale to the purchasers of the said freehold and leasehold premises and the goodwill of the businesses hereinbefore referred to together with the "movable plant and equipment hereinafter referred to at the "price of forty one thousand five hundred pounds."

The operative part of the conveyance contained, first, a conveyance of the freehold properties and, next, an assignment of the leasehold properties; then followed the assignment of the goodwill of the businesses of theatres, cinematograph theatres and a licensed hotel or inn, "together with . . . the benefit of and "subject to all subsisting contracts and engagements . . . in "connection with the said businesses. . . ."

The next three clauses of the conveyance were as follows: "4. The purchasers for themselves and their successors and "assigns hereby covenant with the vendors: (a) that the "purchasers will observe and perform the terms and conditions "affecting the property described in the second schedule hereto "relative to building set out in a conveyance dated October 31, "1919, more particularly referred to in the third schedule hereto "and will keep the vendors indemnified from and against all "actions proceedings costs charges claims demands and expenses "whatsoever in respect of any breach thereof (b) that the "purchasers will duly pay satisfy discharge and fulfil all the "liabilities of the vendors and their nominees subsisting at "the date hereof in relation to the forward contracts and engagements of the vendors taken over by the purchasers and will "indemnify the vendors and any nominee of the vendors who "may be personally liable thereunder from and against all actions "proceedings costs charges claims demands and expenses whatsoever in respect of any breach thereof arising after the date "hereof (c) that the purchasers will henceforth during the "continuance of the terms created by the first and second leases "pay the rents thereby reserved and perform and observe the "covenants on the lessees part contained therein and will at all "times hereafter keep the vendors indemnified against all proceedings costs claims and expenses whatsoever in respect of the "said rents and covenants or in anywise relating thereto. 5. "The vendors hereby covenant with the purchasers that they "the vendors will procure that until March 25, 1969, the premises "known as the Royal Pavilion at Ramsgate shall not (a) Be open "to the public between September 30 in each year and the "succeeding Whit Saturday (both days inclusive) except for "entertainment by living actors or performers for one performance "in each calendar month save with the express written consent "of the purchasers which consent may be given or withheld at "their sole discretion (b) Be used at any other time for the entertainment of the public (whether or not for profit) by any other "medium than living actors or performers and without prejudice "to the generality of the foregoing any entertainment by means "of cinematograph or other mechanical means of reproduction "including rediffusion by television of cinematograph films (as "distinct from mechanical entertainment available to 'live' "theatres in substitution for 'live' shows) shall be deemed to "be specifically precluded. 6. The vendors hereby covenant "with the purchasers that the vendors will pay satisfy and "discharge all the debts outgoings obligations and liabilities of "whatsoever nature of the vendors (including all capital expenditure) in respect of the said businesses licences contracts or "otherwise subsisting at accrued due on or apportionable to the "period up to the date hereof and will indemnify the purchasers "against all actions proceedings costs claims and demands in "respect thereof."

The restriction in clause 5 was registered as a land charge under Class D (ii).

By an assignment dated January 9, 1953, the Pavilion was assigned by Thanet Theatrical to Ramsgate Pavilion Ltd. Thanet Theatrical was wound up on June 5, 1957. Finally, by an assignment dated June 12, 1959, the Pavilion was assigned by Ramsgate Pavilion Ltd. to the plaintiff, Frank Ronald Whelan. Of the four properties comprised in the conveyance dated July 7, 1952, the defendant company retained the King's Theatre, which lay 175 yards to the west of the Pavilion.

By this summons the plaintiff sought (1) a declaration that the covenants contained in clause 5 of the conveyance of July 7, 1952, were not binding on him or any other leaseholder of the Pavilion; (2) alternatively, pursuant to section 84 (2) of the Law of Property Act, 1925, that the nature and extent of the restrictions (if any) imposed by the covenants might be declared and whether they were enforceable and if so, by whom; and (3) that the entry of the restrictions in the Land Charges Register might be cancelled. The summons was heard on affidavit evidence and the facts were not in dispute.

D. A. Thomas for the plaintiff. For a covenant to bind a covenantor's successors in title each of the three following conditions must be fulfilled: (1) the covenant must be negative in nature; (2) it must be made for the protection of land retained by the covenantee; and (3) the burden of the covenant must have been intended to run with the covenantor's land: see Megarry & Wade, The Law of Real Property, 2nd ed. (1959), p. 727. None of these conditions has been fulfilled by the covenants in clause 5, and the burden, therefore, has not passed to the plaintiff. (1) A covenant "to procure" that something shall not be done is positive in form and nature: see the definition of "procure" in the Oxford English Dictionary (1909 ed.), Vol. VII, p. 1419, as meaning "obtain by care or effort." (2) The covenant was taken not for the protection of the properties comprised in the conveyance viewed as land but for the protection of the defendant company's business: see *London County Council* v. *Allen.*[2] *Newton Abbot Co-operative Society Ltd.* v. *Williamson & Treadgold Ltd.*[3] is distinguishable, since it deals with the annexation of a benefit, not the passing of a burden—the criticism of that case in Preston & Newsom, Restrictive Covenants Affecting Freehold Land, 2nd ed. (1954), pp. 71 et seq., is adopted. (3) Before 1925, in order to bind assigns of the covenantor it was necessary to state in the conveyance that the covenantor covenanted on behalf of his successors in title as well as of himself (see *In re Fawcett and Holmes' Contract*[4]); now, by section 79 (1) of the Law of Property Act, 1925, a covenant relating to land, unless a contrary intention is expressed, is deemed to be made by the covenantor on behalf of himself and his successors in title; the words "unless "a contrary intention is expressed" simply mean "unless a "contrary intention appears from the expressions used": see *Broomfield* v. *Williams*[5] on section 6 (4) of the Conveyancing and Law of Property Act, 1881 (now section 62 (4) of the Act of 1925). In this case a contrary intention appears from the wording of clauses 4, 5 and 6.

Peter Oliver for the defendant company. (1) All the acts which the plaintiff has to procure are negative, and the fact that he has to take steps in order "to procure" does not prevent the covenant from being negative in substance. Further, the covenant imports an obligation on the plaintiff himself as a successor in title not to do any prohibited act. The landlord can control the way in which the premises are used by persons claiming under him, and the use of the positive word "procure" is merely an alternative formula for the more common prohibition against "permitting" or "suffering" acts to be done: see Preston & Newsom, 3rd ed. (1960), pp. 110 et seq. (2) It is not conceded that the business carried on on the land can be separated from the land itself. In *London County Council* v.

[2] [1914] 3 K.B. 642, 660, C.A.

[3] [1952] Ch. 286; [1952] 1 T.L.R. 283; [1952] 1 All E.R. 279.

[4] (1889) 42 Ch.D. 150; 5 T.L.R. 515, C.A.

[5] [1897] 1 Ch. 602; 13 T.L.R. 278, C.A.

Allen[6] the covenantee had no land which could be protected, but in the *Newton Abbot* case[7] Upjohn J. held that the covenant was taken not only for the benefit of the business carried on by the covenantee but also for the benefit of the premises, the totality of the covenantee's assets. [Reference was also made to *Wilkes* v. *Spooner*[8] and *Holloway Bros.* v. *Hill.*[9]] (3) The conveyance contains no express provision that successors in title of the covenantor are not to be bound by the covenant, and section 79 of the Act of 1925 therefore requires the covenant to be read as if such successors were referred to. The omission of the reference to successors in contradistinction to clause 4 of the conveyance does not constitute the expression of a "contrary "intention" within section 79 (1). *In re Fawcett and Holmes' Contract*[10] was decided before the Act of 1925 and there was no provision corresponding to section 79 (1) of that Act in the Act of 1881.

D. A. Thomas replied.

Cur. adv. vult.

June 29. PENNYCUICK J. stated the facts and continued: In order to answer the question raised by the summons it is necessary in the first place to determine the construction of clause 5 of the conveyance. By that clause Thanet Theatrical covenanted to procure that, during a term corresponding to the residue of its leasehold interest, the use of the Pavilion should be restricted as therein mentioned. The word "procure" is defined in the Oxford English Dictionary (1909 ed.), Vol. VII, p. 1419, as meaning "obtain by care or effort," and can be more simply paraphrased as "see to it." The obligation undertaken by Thanet Theatrical is to see to it that a certain state of affairs prevails during the specified term. It seems to me that a covenant so expressed is naturally to be regarded as of a purely personal character. The tenant of property is in a position to ensure that during his tenancy the property is not to be used in a specified manner either by himself or by persons claiming under him, whether as licensees, underlessees or assignees, and the word "procure" is appropriate to denote a personal obligation so to ensure. So here the covenant regarded purely as a personal covenant would have been perfectly sensible and workable had Thanet

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[6] [1914] 3 K.B. 642.

[7] [1952] Ch. 286.

[8] [1911] 2 K.B. 473; 27 T.L.R. 426, C.A.

[9] [1902] 2 Ch. 612; 18 T.L.R. 745.

[10] 42 Ch.D. 150.

Theatrical remained in existence. On the other hand, it seems to me that a covenant so expressed is not naturally to be regarded as a covenant on behalf of the covenantor and his successors in title so as to run with the land. The causative verb "procure" is not appropriate where successors in title are themselves to be bound. The covenantor under a covenant intended to run with the land would not sensibly be expressed as procuring his successors to abstain from doing whatever is covenanted not to be done.

The view that the covenant in clause 5 is intended to be of a purely personal character derives much support from the clauses which immediately precede and follow it. Clause 4, which as regards sub-paragraphs (*a*) and (*c*) at any rate is plainly intended to run with the land, is introduced by the apt words "The purchasers "for themselves and their successors and assigns hereby covenant "with the vendors." Clause 6, which is plainly intended as a purely personal covenant, is introduced only by the words "the "vendors hereby covenant with the purchasers." It would be strange draftsmanship to interpose between these two covenants a covenant intended to run with the land, and yet only introduced by the words "the vendors hereby covenant with the purchasers."

It is important in construing the covenant in clause 5 to bear in mind that the period covered by it is only 17 years. A restriction for so short a period can readily be achieved by a purely personal obligation, unlike a restriction in perpetuity which can only be fully effective if it runs with the land.

Mr. Oliver for the defendant company points out that the covenant, though positive in form, may yet be negative in substance. This is so, and I imagine that here the covenant in clause 5 would be regarded as negative to this extent, that it imports an obligation on Thanet Theatrical itself not to do any of the prohibited acts, but I do not think that Thanet Theatrical's positive obligation to procure can, as regards persons claiming under it, be translated into a negative obligation on those parties if upon the natural construction of the covenant they are not bound by it at all.

Mr. Oliver further relies on section 79 of the Law of Property Act, 1925, which reads: "(1) A covenant relating to any land of "a covenantor or capable of being bound by him, shall, unless a "contrary intention is expressed, be deemed to be made by the "covenantor on behalf of himself his successors in title and the "persons deriving title under him or them, and, subject as afore-"said, shall have effect as if such successors and other persons "were expressed. This subsection extends to a covenant to do "some act relating to the land, notwithstanding that the subject-"matter may not be in existence when the covenant is made. "(2) For the purposes of this section in connection with covenants "restrictive of the user of land 'successors in title' shall be "deemed to include the owners and occupiers for the time being of "such land. (3) This section applies only to covenants made after "the commencement of this Act."

So here it is contended that no contrary intention is expressed in the conveyance dated July 7, 1952, and that, therefore, the covenant in clause 5 must be deemed to be made by Thanet Theatrical on behalf of itself and its successors in title. If the words "unless the contrary intention is expressed" in section 79 mean: unless the instrument contains express provision to the contrary, this contention would, I think, be unanswerable. But it seems to me the words "unless a contrary intention is "expressed" mean rather: unless an indication to the contrary is to be found in the instrument, and that such an indication may be sufficiently contained in the wording and context of the instrument even though the instrument contains no provision expressly excluding successors in title from its operation. It can hardly be the intention of the section that a covenant which, on its natural construction, is manifestly intended to be personal only, must be construed as running with the land merely because the contrary is not expressly provided.

There appears to be no authority in point under section 79 itself, but some support for the view which I have expressed is to be found in the judgment of the Court of Appeal in two cases concerned with similar words in section 6 (4) of the Conveyancing and Law of Property Act, 1881, now reproduced in section 62 of the Law of Property Act, 1925, namely, *Broomfield* v. *Williams* [1] and *Gregg* v. *Richards*.[2] So here, although the covenant contains no express provision to the effect that it is not made on behalf of successors in title, it does, as it seems to me, contain sufficient indication to this effect.

The views which I have indicated are sufficient to dispose of this summons in favour of the plaintiff. I must, however, mention shortly one contention advanced by Mr. Thomas for the plaintiff, namely, that the covenant in clause 5 is for the protection of the defendant company's business and not for the protection of the properties comprised in the conveyance viewed as land, and that for this reason the burden of the covenant is incapable of running with the Pavilion. Upon the view which I have taken this point does not arise; since Thanet Theatrical's successors in title are not bound on the proper construction of the covenant. If the point did arise it would in my judgment be covered by the decision of Upjohn J. in *Newton Abbot Co-operative Society Ltd.* v. *Williamson & Treadgold Ltd.*[3] and this contention would fail.

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[1] [1897] 1 Ch. 602; 13 T.L.R. 278, C.A.

[2] [1926] Ch. 521, C.A.

I propose, accordingly, to make a declaration in terms of paragraph 1 of the originating summons, and a direction in the terms of paragraph 3 of the originating summons.

Judgment for the plaintiff with costs.

Solicitors: *Isadore Goldman & Son*; *Joynson-Hicks & Co.*

M. G. T.

[3] [1952] Ch. 286; [1952] 1 T.L.R. 283; [1952] 1 All E.R. 279.

[VACATION COURT.]

1961
Aug. 9.
Widgery J.

WARWICK RURAL DISTRICT COUNCIL *v.* MILLER-MEAD.

[1961 W. No. 2264.]

MILLER-MEAD *v.* WARWICK RURAL DISTRICT COUNCIL.

[1961 M. No. 1069.]

Public Health—Nuisance—Action by local authority for abatement—Capacity to sue—Being "of opinion that summary proceedings" inadequate—Resolution accordingly three days after issue of writ by solicitors—Ratification—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 100.

Agency — Ratification — Competency of principal — Action by local authority for abatement of nuisance—Being "of opinion" of necessity therefor—Resolution accordingly after issue of writ by solicitors—Whether authority competent to ratify issue of writ—Public Health Act, 1936, *s.* 100.

On January 3, 1961, a local authority served notices on the owner of a caravan site for the abatement of an alleged statutory nuisance on the site, but failed to obtain compliance with the notice. On March 27, 1961, the site-owner issued a writ against the local authority. On July 21, 1961, the solicitors to the local authority, invoking the powers conferred on a local authority by section 100 of the Public Health Act, 1936,[1] to sue in its own name in the High Court in respect of a statutory nuisance, issued a writ against the site-owner in the High Court and served notice of motion to restrain him from keeping or maintaining the site in such state as to be a statutory nuisance, contrary to section 92 of the Act of 1936.

Three days later, on July 24, 1961, the local authority in council meeting (1) resolved to defend the proceedings begun by the site-owner in March, and (2) resolved, "being of opinion that summary "proceedings would afford an inadequate remedy to secure com-"pliance with the notices of January 3, 1961," to take proceedings in the High Court to secure the abatement of the alleged statutory nuisance.

On motions for the injunction and also for the dismissal of the defendant's action as an abuse of the process of the court, the defendant raised a preliminary objection that the proceedings were a nullity, since at the date of the issue of the writ the local authority had not recorded its "opinion" by resolution, as required by section 100 of the Act of 1936, and therefore had no capacity to sue and could not by subsequent resolution ratify the act of its servant in issuing the writ:—

Held, that where, as here, the interval between the issue of the writ and the passing of the resolution by an existing local authority was so brief as to justify the inference that the opinion which the local authority would have recorded on the date when the writ was issued would have been the same as that expressed by resolution three days later, the local authority had the capacity to sue (and also to defend proceedings by the defendant) on July 21, and could ratify by its subsequent resolution the earlier act of its servant; and that the proceedings were consequently correctly instituted.

Quaere, whether the local authority would have had capacity to sue if the circumstances and the interval of time between the issue of the writ and the resolution were such as to justify a belief that the opinion of the local authority would have been different at each of those dates.

Danish Mercantile Co. Ltd. v. *Beaumont* [1951] Ch. 680; [1951] 1 All E.R. 925 applied.

PRELIMINARY OBJECTION.

On January 3, 1961, the Warwick Rural District Council served notices on the owner of a caravan site, Leonard Harry Miller-Mead, at Seaton's Field, Kenilworth, Warwick, trading as Coventry Cars and Caravans, Queen Victoria Street, Coventry, under the summary procedure provided by the Public Health Act, 1936, for the abatement of an alleged statutory nuisance in respect of the caravan site. No summons was served on the site-owner subsequent to those notices. On March 27, 1961, the site-owner issued a writ in the High Court against the council [1961 W. No. 1069], but did not deliver his statement of claim until a date subsequent to the present proceedings.

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[1] Public Health Act, 1936, s. 100: "If in the case of any statutory nuis-"ance the local authority are of "opinion that summary proceedings "would afford an inadequate remedy, "they may in their own name take "proceedings in the High Court for "the purpose of securing the abate-"ment or prohibition of that nuisance, "and such proceedings shall be main-"tainable notwithstanding that the "authority have suffered no damage "from the nuisance."

On July 21, 1961, the solicitors to the council issued a writ in the High Court against the site-owner [1961 W. No. 2264] and on the same date served on him a notice of motion asking the court for an injunction to restrain him from causing or suffering or permitting a statutory nuisance by keeping or maintaining the caravan site in such state as to be a statutory nuisance and prejudicial to health, contrary to section 92 of the Act of 1936. The writ was issued in the name of the council pursuant to its powers under section 100 of that Act to proceed in the High Court in its own name if in the case of a statutory nuisance "the local authority are of opinion that summary "proceedings would afford an inadequate remedy. . . ."

Three days later, on July 24, 1961, the council met and considered the position in relation to the caravan site, a report of its officers on the general insanitary conditions alleged to exist on the site, the alleged failure of the defendant to comply with the abatement notices served on him, and the High Court writ issued by him in March, 1961. The council also had before them the opinion of counsel obtained by their solicitors advising that the council might proceed against the defendant in its own name under section 100 of the Act of 1936. The council thereupon passed two resolutions, as follows: (1) that the council do take the necessary steps to defend the proceedings issued by the defendant by writ against the council in the Chancery Division dated March 27, 1961; and (2) that the council "being of opinion "that the summary proceedings would afford an inadequate "remedy to secure compliance with abatement notices served on "January 3, 1961, do take proceedings in the High Court against "such person or persons as it may be considered necessary for "the purpose of securing the abatement or prohibition of the "statutory nuisance at Seaton's Field."

On the hearing of the council's motion for an injunction and a further motion to dismiss the defendant's action as an abuse of the process of the court, the preliminary objection was taken on behalf of the defendant that as at the date of the issue of the writ there had been no resolution by the council recording its opinion, the council had no jurisdiction to sue on July 21, and that the subsequent resolutions could not operate to ratify what had been done on July 21.

R. E. Megarry Q.C. and *Jeremiah Harman* for the defendant. The normal procedure by which a local authority applies for an injunction in the High Court for breaches of the law in its district is by way of relator proceedings in the name of the Attorney-General; but in the limited field of statutory nuisance section 100 of the Public Health Act, 1936, affords an opportunity to a local authority to proceed in its own name. Two conditions, however, must be satisfied before the local authority is given power under section 100: first, the case must be one of statutory nuisance, and, secondly, the local authority must have formed the opinion that summary proceedings would be an inadequate remedy. A local authority, being a statutory corporation, can only do what the statute authorises, and by its nature cannot express or form an opinion in any way other than by resolution in council meeting. In the present case, at the date when the writ was issued in the name of the council, no resolution recording the council's opinion had been passed, and, accordingly, the council had no capacity to sue and the proceedings are a nullity. Similarly, under section 276 of the Local Government Act, 1933, "where a local authority deem it "expedient" they may prosecute or defend legal proceedings; but once again there is a condition precedent; they must in council have "deemed it expedient"; and in this case the decision to defend the action brought by the defendant in the previous March was taken after the defence had been put in.

Secondly, the resolution of July 24 cannot operate to ratify what was done by the council's solicitors on July 21. In *Kelner* v. *Baxter* [2] the well-known principle was laid down that a contract made on behalf of a company not yet in existence could not be ratified subsequently by the company when it came into existence, because at the date of the contract there was no competent principal in existence who could himself have acted lawfully at the date when the act to be ratified was done. This principle was applied in *Boston Deep Sea Fishing and Ice Co. Ltd.* v. *Farnham (Inspector of Taxes)*,[3] where at the time when the acts were done the principal existed but lacked capacity to do those acts, so that the purported ratification of those acts was held ineffective. That case is in pari materia with the present case. In the present case the council could on July 21 have given itself the capacity to sue by meeting and passing a resolution recording its opinion in compliance with section 100; but it did not do so, and therefore it had no capacity to bring the proceedings in its own name when the act was done, and has no power to ratify the act subsequently. *Danish Mercantile Co. Ltd.* v. *Beaumont* [4] is quite different, for there the principal had full capacity at the time when the act was done. The position in regard to ratification is the same under section 276 of the Act of 1933; the language of the council minute does not purport to ratify a prior authorisation to defend the action brought by the defendant. [*Bowyer, Philpot & Payne Ltd.* v. *Mather* [5] was also referred to.]

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[2] (1866) L.R. 2 C.P. 174.

[3] [1957] 1 W.L.R. 1051, 1057; [1957] 3 All E.R. 204.

Though in this case the interval between the issue of the writ and the passing of the resolution was only three days, the principle to be applied is the same, for if there had been a longer interval of time the circumstances might have changed so much after the issue of the writ that the passing of the resolution would not have been justified.

H. E. Francis Q.C. and *E. W. H. Christie* for the council. There is no substance in this technical objection. All that section 100 requires is that the local authority shall be of opinion that summary proceedings are inadequate. Nothing in the section requires that at the date of commencing High Court proceedings the council shall have passed a resolution. The meeting on July 24 was an emergency meeting. On July 21 the council could have formed this opinion if it had applied its mind to the question; and if it held the requisite opinion on July 24 the court is invited to find as a fact that it would have held the same opinion on July 21, for the circumstances were precisely the same on both dates. The opinion of a local authority on a matter affecting health is much influenced by the reports and views of its permanent officials, who were of opinion that High Court proceedings were necessary. The question of capacity to sue does not arise in this case, for the local authority on July 21 undoubtedly had the power to authorise these proceedings to be taken in its own name under section 100; it had the requisite capacity.

On the question of ratification, it does not have to be express but may be inferred from conduct, and that is the position here.

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[4] [1951] Ch. 680; [1951] 1 All E.R. 925, C.A.

[5] [1919] 1 K.B. 419, D.C.

It is conceded that if there had been a longer interval between the two dates, and circumstances had changed radically, the position might be different.

The argument based on section 276 of the Act of 1933 is also without substance, for the defendant's proceedings had been before the council for some time and had been referred to in a number of earlier resolutions.

Megarry Q.C. in reply. A local authority can only express an opinion by a resolution in a corporate meeting: see the definition of "local authority" in section 1 of the Act of 1936. To say that because a local authority can do something it has therefore done it is quite inadmissible. The "if" clause in section 100 must be satisfied before the council can act. The deficiency on July 21 was a deficiency of capacity and these proceedings are therefore ineffective.

WIDGERY J. These two actions give rise to an interesting, and, so far as I can discover, novel point, which is not without difficulty. It can be illustrated in regard to the action *Warwick Rural District Council* v. *Miller-Mead* as well as by reference to the other action. In brief, what happened in the case in which the Warwick Rural District Council are plaintiffs was that a writ was issued on July 21, 1961, claiming on behalf of the council certain injunctions against the defendant in respect of his alleged use of land as a caravan site in such a way as to amount to a nuisance within the Public Health Act, 1936. It is provided in section 100 of that Act that: "If in the case "of any statutory nuisance the local authority are of opinion "that summary proceedings would afford an inadequate remedy, "they may in their own name take proceedings in the High "Court for the . . . abatement . . . of that nuisance. . . ."

It is not disputed that if the local authority properly take that section into use they can bring proceedings of the kind in question in their own name. The difficulty in the present case is that at the date of the writ the plaintiff authority had passed no resolution with regard to the bringing of these proceedings and in fact no such resolution was passed until three days later, when on July 24 the authority duly passed two resolutions, one to take all necessary steps to defend the action taken by Mr. Miller-Mead, and the other, that, "the council, being of "opinion that summary proceedings would afford an inadequate "remedy to secure compliance with abatement notices served "on January 3, 1961, do take proceedings in the High Court

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"against such person or persons as it may be considered necessary for the purpose of securing the abatement or prohibition of the statutory nuisance at Seaton's Field, in the County of Warwick."

The position here is thus that as a matter of fact at the date of the writ the local authority had not expressed its view on this matter by resolution, but did express the appropriate view some three days later.

My attention has been drawn to *Danish Mercantile Co. Ltd.* v. *Beaumont*,[1] which deals with proceedings begun in the name of a limited company at a time when there was no authority for those proceedings to be brought and where it was held by the Court of Appeal that proceedings so begun were not necessarily a nullity for all purposes but that the action of the solicitor or other person initiating the proceedings could be ratified by the ligitant principal; and it was said by Mr. Francis on behalf of the plaintiff authority that I should apply that principle to the present case and regard the resolutions of July 24 as being a proper ratification of the action taken on behalf of the authority by their solicitors three days previously.

Mr. Megarry, for the defendant, answers this argument by referring me to the well-known principle that there can be no ratification of the act of an agent unless at the date of the original act there was an existing and competent principal, namely, competent to have done the act himself on his own behalf; and he argues that if a local authority had not passed a resolution formally expressing the opinion required by section 100 of the Act of 1936 there was in those circumstances no principal at the time of the agent's act capable of ratifying that act. More precisely, he says that if at the date of the writ in this case there was no resolution of the authority recording its opinion that summary proceedings would form an inadequate remedy then it was at that time an incompetent plaintiff, having regard to the limitations imposed on a local authority by its constitution, and in those circumstances there could be no ratification of the agent's act.

Counsel agreed that the substantial point here is whether the fact that at the date of the writ there was no resolution recording the opinion of the authority is a question which goes to the capacity of the authority to sue.

I do not find the question a particularly easy one, but in

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[1] [1951] Ch. 680; [1951] 1 All E.R. 925.

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my judgment this authority did not lack capacity to sue. It seems to me that on July 21 there was a local authority known as the Warwick Rural District Council which, if it had applied its mind to the question, would have had a capacity on that date to institute these proceedings; and just as there can be ratification although the authority has not considered the expediency of proceedings generally at the date of the writ, so in my judgment, there can be ratification although the authority has not at that date specifically considered whether in its opinion it should proceed under section 100.

I would reserve for another occasion the question which might arise if there were a really substantial interval of time between the issue of the writ and the passing of a resolution in circumstances which legitimately justified the belief that the opinion of the local authority might have been different at the date of the writ from that which it held at the date of the resolution. But in this case the interval is three days only; and in so far as I am entitled to consider the inchoate opinion of the local authority at the date of the writ, I am driven to the view that it would have been the same as that expressed in the resolution of July 24. Hence, the preliminary point fails, and these proceedings are correctly constituted.

Preliminary objection dismissed.

Solicitors: *Devonshire & Co. for Wright, Hassall & Co., Leamington Spa; James & Charles Dodd.*

M. M. H.

LITTLEWOODS MAIL ORDER STORES LTD. v. INLAND REVENUE COMMISSIONERS.

C. A.

1961
June 19, 20, 21, 22, 23.

Lord Evershed M.R., Harman and Donovan L.JJ.

Revenue—Stamp duty—Conveyance or transfer on sale—Exchange or conveyance on sale—Deed entitled "deed of exchange"—No evidence of preceding contract of sale—"Exchange"—"Excambion"—Meaning—Whether lease is a "conveyance"—Lease by friendly society to company—Assignment of lease to an associated company—Whether beneficial interest in the property previously "conveyed" by a person not associated with the transferor or transferee—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch.* 1—*Finance Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 28), *s.* 42—*Finance Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 46), *s.* 50.
Statute—Construction—Amending Act—Meaning of word—Prima facie

to be construed as in Act amended—Principle to be taken with pinch of salt—Whether lease a "conveyance"—Stamp Act, 1891, *Sch.* 1 *—Finance Act,* 1938, *s.* 50 (1) (*b*).

In 1958, a friendly society owned certain freehold property subject to a lease for 99 years from June, 1947, at an annual rent of £23,444 in favour of company L. On December 8, 1958, the society granted to company L a lease of the property for 22 years, 10 days, at an annual rent of £6, which operated as a surrender of the 99-year lease. On December 9, company L assigned the 22-year, 10-day lease to company F which was a wholly owned subsidiary of company L. On December 10, company F granted to company L an underlease of the property for 22 years at an annual rent of £42,450. On December 11, the society and company F executed a deed, called a deed of exchange, whereby company F assigned to the society the 22-year, 10-day lease, subject to and with the benefit of the 22-year underlease, and the society conveyed to company F the fee simple of the property, subject to and with the benefit of the 22-year, 10-day lease. On December 12, company F executed a deed guaranteeing the payment to the society by company L of the annual rent of £42,450 reserved by the 22-year underlease and charging its freehold reversion with payment thereof. On December 13, company L, by deed, indemnified the society against payment of stamp duty and penalties.

Company L contended (1) that the deed of exchange of December 11 should be assessed under the heading in the Stamp Act, 1891, Sch. 1, "exchange or excambion," liable to stamp duty of 10s., and not under the heading "conveyance or transfer on sale"; (2) that the deed of assignment dated December 9 was exempted from stamp duty by section 42 of the Finance Act, 1930,[1] and was not deprived of that exemption by section 50 of the Finance Act, 1938 [2]:—

Held, (1) that the deed of exchange of December 11 was not "a conveyance on sale" within the definition in section 54 of the Act of 1891 and the first schedule to that Act, for, applying the ordinary standards as to what was "a sale," the transaction lacked the essential characteristics of the presence of a buyer, a seller, something sold and a price or consideration for what was sold. Duty was leviable on instruments, not transactions, but what had to be ascertained was what was in reality the substance of the transaction effected by the instrument (post, pp. 621, 631).

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[1] Finance Act, 1930, s. 42: "(1) "Stamp duty under the heading "'Conveyance or Transfer on Sale' "in the First Schedule to the Stamp "Act, 1891, shall not be chargeable "on an instrument to which this "section applies . . . (2) This section "applies to any instrument as "respects which it is shown to the "satisfaction of the Commissioners "of Inland Revenue—(*a*) that the "effect thereof is to convey or transfer "a beneficial interest in property "from one company with limited "liability to another such company; "and (*b*) that either—(i) one of the "companies is beneficial owner of not "less than ninety per cent. of the "issued share capital of the other "company . . ."

[2] Finance Act, 1938, s. 50: "(1) "Section 42 of the Finance Act, 1930 ". . . shall not apply to any such in- "strument, unless it is shown to the "satisfaction of the Commissioners "of Inland Revenue that the instru- "ment was not executed in pursuance "of or in connection with an arrange- "ment whereunder—(*a*) the con- "sideration for the transfer or con- "veyance was to be provided directly "or indirectly by a person other than "a company which at the time of the "execution of the instrument was "associated with either the trans- "feror or the transferee; or (*b*) the "beneficial interest in the property "was previously conveyed or trans- "ferred directly or indirectly by such "a person as aforesaid."

Observations of Viscount Simonds in *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners* [1958] A.C. 549, at p. 558; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406, H.L.; and of Lopes L.J. in *Great Western Railway Co.* v. *Inland Revenue Commissioners* [1894] 1 Q.B. 507; 10 T.L.R. 128, C.A. applied.

(2) That, although the court would construe the terms of an Act of Parliament which amended existing legislation on a particular subject-matter in the sense in which they had been held to bear in the main legislation, that principle must not be carried too far; and that the phrase "conveyed or transferred" in section 50 (1) (*b*) of the Act of 1938 should be construed according to the admitted ordinary legal meaning of the words used and not restricted so as to exclude the creation of a lease by referring to the distinction made in the first schedule to the Act of 1891 between a "conveyance" and a "lease" (post, pp. 621, 627, 632–633 et seq.).

Escoigne Properties Ltd. v. *Inland Revenue Commissioners* [1958] A.C. 549 applied.

Observations of Lord Simonds in *Fendoch Investment Trust Co.* v. *Inland Revenue Commissioners* (1943–45) 27 T.C. 53, 68; [1945] 2 All E.R. 140, H.L.; and Lord Mansfield in *Rex* v. *Luxdale* (1758) 1 Burr. 445, 448, cited with approval by Farwell L.J. in *Goldsmiths' Co.* v. *Wyatt* [1907] 1 K.B. 95; 23 T.L.R. 107, C.A. considered.

Decision of Danckwerts J. [1961] Ch. 210; [1961] 2 W.L.R. 25; [1961] 1 All E.R. 195 affirmed.

Appeal and cross-appeal from Danckwerts J.

Littlewoods Mail Order Stores Ltd. (hereinafter called "Littlewoods") appealed from assessment of stamp duty made on two out of six deeds relating to transactions in respect of the same property presented for adjudication under section 12 of the Stamp Act, 1891.

The following facts were stated by the Commissioners of Inland Revenue in the case stated for the opinion of the court: In 1958, before the execution of the first of the six deeds, the trustees for the time being of a friendly society, the Independent Order of Oddfellows (hereinafter called "Oddfellows") were entitled to the fee simple of Jubilee House, Oxford Street, London, which had been let to Littlewoods for the term of 99 years from June 24, 1947, at an annual rent of £23,444. After the execution of these six deeds, Fork Manufacturing Co. Ltd. (hereinafter called "Fork"), a wholly owned subsidiary of Littlewoods, had acquired the fee simple, the term of 99 years had been extinguished and Oddfellows were entitled to the payment of £42,444 per annum under a lease for 22 years from December 10, 1958, payable by Littlewoods but guaranteed by Fork and charged on its freehold reversion. The six deeds were as follows:

1. Monday, December 8, 1958. A lease by Oddfellows to Littlewoods of Jubilee House for 22 years and 10 days at a rent of £6 per annum, which operated as a surrender of the existing lease.

2. Tuesday, December 9, 1958. An assignment made between Littlewoods and Fork which, after reciting, "Whereas: (1) By "a lease dated the eighth day of December, 1958, and made "between [Oddfellows] of the one part and Littlewoods of the "other part . . . Jubilee House Oxford Street and factory premises "abutting Ramillies Place registered at the Land Registry "with absolute title under Title Numbers 276399 and 280914 ". . . were demised by [Oddfellows] to Littlewoods from the said "eighth day of December 1958 for the term of twenty-two years "and ten days subject (so far as then subsisting) to the leases or "tenancies then affecting the demised premises and except and "reserved as therein mentioned and subject also to the payment "of the yearly rent of £6 thereby reserved and to the covenants "agreements and conditions therein contained (2) Littlewoods is "the beneficial owner of the whole of the issued share capital of "Fork (3) Littlewoods has requested Fork to accept the transfer "to Fork of the property hereby assured in manner hereinafter "appearing which Fork has agreed to do," provided " that in "pursuance of the said agreement and in consideration of the "premises Littlewoods as beneficial owner hereby assigns unto "Fork all the premises comprised in or demised by the said "lease dated the eighth day of December 1958 hereinbefore mentioned to hold the same unto Fork for all the residue now "unexpired of the said term of twenty-two years and ten days "granted by the said lease subject henceforth to the payment of "the annual rent of six pounds thereby reserved and to the covenants agreements and conditions therein contained and on the "part of the lessee to be observed and performed."

3. Wednesday, December 10, 1958. An underlease by Fork to Littlewoods of Jubilee House for 22 years at a rent of £42,450 per annum.

4. Thursday, December 11, 1958. A deed described as a deed of exchange and made between the then trustees of Oddfellows and

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Fork, which recited the lease dated December 8, 1958, and continued: " (2) [Oddfellows] . . . are entitled to the premises " comprised in and demised by the lease for an estate in fee simple " in reversion expectant upon the determination of the term " thereby granted (3) By an assignment made the ninth day of " December 1958 between [Littlewoods] of the one part and " [Fork] of the other part the entirety of the premises comprised " in and demised by the lease were assigned to [Fork] for all the " residue then unexpired of the said term of twenty-two years and " ten days subject to the payment of the said yearly rent reserved " by and the performance and observance of the covenants on the " part of the lessees and conditions contained in the lease (4) By " an underlease (hereinafter referred to as 'the underlease') " made the tenth day of December 1958 between [Fork] of the " one part and [Littlewoods] of the other part the entirety of " the premises comprised in and demised by the lease were sub- " demised to [Littlewoods] for all the residue then unexpired of " the said term granted by the lease except the last ten days " thereof subject to the payment of the yearly rent of £42,450 and " the performance and observance of the covenants on the part " of the underlessees and conditions in the underlease reserved " and contained (5) [Fork] is entitled to the premises comprised " in and demised by the lease for all the residue of the term there- " by granted in reversion expectant upon the determination of the " term granted by the underlease (6) The parties hereto have " mutually agreed to exchange their said respective estates and " interests in the said property Now in pursuance of the said " agreement and for the considerations hereinafter mentioned and " divers other good and valuable considerations this deed wit- " nesseth as follows:—1. In consideration of the assignment here- " inafter made by [Fork] to [Oddfellows] [Oddfellows] as trustees " hereby transfer to [Fork] all that the land and property com- " prised in the title above referred to subject to and with the " benefit of the lease but to the intent that any leasehold estate " of [Fork] comprised in Title No. LN 58308 of which [Fork] " is the registered proprietor shall merge and be extinguished in " the freehold estate hereby transferred to [Fork]

" 2. In consideration of the transfer hereinbefore made by " [Oddfellows] to [Fork] [Fork] as beneficial owner hereby " assigns unto [Oddfellows] all those leasehold premises com- " prised in and demised by the lease to hold the same unto " [Oddfellows] for all the residue now unexpired of the term "granted by the lease subject henceforth to the payment of the "said yearly rent of £6 and the performance and observance of "the covenants on the part of the lessees and conditions in the "lease reserved and contained and subject also to but with the "benefit of the underlease." By clause 3 Oddfellows covenanted with Fork to pay the rent and observe the covenants and conditions contained in the lease dated December 8, 1958.

5. Friday, December 12, 1958. A deed of guarantee and legal charge between Fork and Oddfellows, by which deed Fork guaranteed payment to Oddfellows by Littlewoods of the rent reserved by the underlease and charged the freehold reversion with the payment.

6. Saturday, December 13, 1958. A deed of indemnity between Littlewoods and Oddfellows whereby Oddfellows were indemnified against payment of stamp duty and penalties.

The commissioners, through the Controller of Stamps, asked the solicitors for Littlewoods to explain the circumstances attending the execution of the lease of December 8, 1958, and the considerations which prompted the landlords to grant this lease for an annual rent of only £6. The controller also requested to be furnished with a narrative statement of the events and negotiations leading up to the execution of the various documents in the adjudication, supported by the relative correspondence, and any agreement entered into by the parties. It was stated by the solicitors to Littlewoods that no form of agreement other than the documents presented for adjudication was entered into by the parties.

With regard to the assignment of December 9, 1958, Littlewoods claimed that this was exempt from duty by reason of the provisions of section 42 of the Finance Act, 1930. There was furnished by their solicitors a copy of a statutory declaration sworn on December 18, 1958, by a partner in that firm. Paragraph 6 of the statutory declaration stated that the assignment of December 9, 1958, was not executed in pursuance of or in connection with such an arrangement as is described in section 50 of the Finance Act, 1938.

The commissioners were of opinion that the assignment by Littlewoods to Fork of December 9, 1958, conferred a substantial benefit on Fork, being made either for no consideration or for an inadequate consideration, and was a conveyance or transfer operating as a voluntary disposition falling within the provisions of section 74 of the Finance (1909–10) Act, 1910, and chargeable with ad valorem duty under that section. Assuming that the effect of the assignment was to convey or transfer a beneficial interest in property from one " associated " company with limited liability (namely, Littlewoods) to another such company (namely, Fork) within the terms of section 42 (2) (*a*) of the Finance Act, 1930, the commissioners were of opinion that such beneficial interest " was " within the meaning of section 50 of the Finance Act, 1938, " previously conveyed or transferred " by Oddfellows or their trustees who were " associated " neither with Littlewoods nor Fork; and, notwithstanding the statutory declaration, the commissioners were not satisfied that the assignment was not executed in pursuance of or in connection with an arrangement under which such beneficial interest was so previously conveyed or transferred. The commissioners were accordingly of opinion that the exemption claimed was not applicable.

So far as regards the instrument called a " deed of exchange " of December 11, 1958, the commissioners, having considered all the instruments submitted for adjudication and the facts disclosed in the correspondence, came to the conclusion, on the facts before them, that there had been a sale by Oddfellows of the freehold property in consideration of an annuity of £42,444 payable for 22 years, and that the conveyance of the freehold property contained in the instrument called a " deed of exchange " was a " conveyance or transfer on sale " within the meaning of and was chargeable under the provisions of section 56 (2) of the Stamp Act, 1891, and other relevant statutory provisions at the rate of £1 for every £50 on a consideration of £42,444 per annum for 20 years, viz., on £848,880, duty £16,978.

The commissioners assessed the duty on the six deeds as follows: (1) Lease dated December 8, 1958, by reference to the head of charge " Lease or Tack . . . (3) For any other definite " term . . . " in the First Schedule to the Stamp Act, 1891, ad valorem duty in respect of the rent of £6 per annum: 2s. (2) Assignment dated December 9, 1958. Ad valorem voluntary disposition duty under the provisions of section 74 of the Finance (1909–10) Act, 1910, on the estimated value £400,000 of the leasehold interest assigned: £8,000. (3) Underlease dated December 10, 1958. By reference to the before-mentioned head of charge " Lease or Tack . . . (3)," ad valorem duty in respect of the rent of £42,450 per annum: £849. (4) Deed of exchange dated December 11, 1958. As a conveyance on sale of the fee simple by reference to the head of charge " Conveyance or

"Transfer on sale," and to section 56 (2) of the Stamp Act, 1891, ad valorem duty at the rate of £1 per £50 on £42,444 × 20: £16,978. (5) Guarantee dated December 12, 1958: 10s. (6) Deed of indemnity dated December 13, 1958: 10s.

No objection was taken by Littlewoods to the assessment of duty in respect of the deeds numbered 1, 3, 5 and 6 above, nor to the valuation of the property assigned by the assignment of December 9, 1958, at £400,000; but Littlewoods contended that the assignment of December 9, 1958, was exempt from stamp duty under the provisions of section 42 of the Finance Act, 1930, and that the deed described as a deed of exchange dated December 11, 1958, was liable to the duty of 10s. only, under the head of charge "Exchange or Excambion—Instruments affecting" in the First Schedule to the Stamp Act, 1891.

Danckwerts J. declared, first, that the document numbered 2 above (the assignment from Littlewoods to Fork of December 9, 1958) was liable to ad valorem duty as assessed, being taken out of the exemption from duty conferred by section 42 of the Finance Act, 1930, by section 50 (1) (*b*) of the Finance Act, 1938. Secondly, the judge declared that the document numbered 4 (the "deed of exchange" of December 11, 1958) was liable to duty of 10s. only, holding that it was correctly described as a deed of exchange and was not a conveyance on sale. The Crown appealed against the second part of the decision and Littlewoods cross-appealed against the first part of the decision. Notice was given that on the hearing of the cross-appeal the commissioners would contend that the decision of the judge should be affirmed on an additional ground.

B. L. Bathurst Q.C. and *E. Blanshard Stamp* for the Crown. The reference in the lease of December 8 to the original lease for 99 years is a mistake because, irrespective of the intention of the parties, the new lease operated to surrender it: Halsbury's Laws of England, 3rd ed., vol. 23, p. 686.

The commercial effect of the transaction was a conveyance on sale of the freehold to Littlewoods and Fork in consideration of a well-secured payment of £42,440 per annum. That was "money payable periodically" within section 56 (2) for a definite period exceeding 20 years. The duty payable was 2 per cent. of 20 times £42,444—that is, £16,978.

Section 54 of the Act of 1891 defines "conveyance" to include any interest transferred on sale. It is often difficult to distinguish between a sale and an exchange, but a transaction is a "sale" if it is a commercial transaction at a price measured in money or the equivalent of money. An exchange is normally a non-commercial transaction. If a transaction comes under both heads, the Crown is able to elect under which head to levy duty: *Speyer Bros.* v. *Inland Revenue Commissioners.*[3] Liability to stamp duty is determined by the legal effect of a document and the intention of the parties—not purely by the form (Sargeant on Stamp Duties, 3rd ed. (1952), p. 5), though Lord Denning may have gone too far in *Oughtred* v. *Inland Revenue Commissioners*[4] in saying that the form should be disregarded. In income tax legislation " sale " has a narrower meaning than in the stamp duty legislation (see *Kirkness* v. *John Hudson & Co. Ltd.*[5]), and a " conveyance on sale " for stamp duty purposes will not necessarily look like one. [Reference was made to *Jopling* v. *Inland Revenue Commissioners.*[6]] In substance this transaction was not an " exchange " but a transfer of the freehold and it is stampable as a conveyance on sale. The " deed of exchange " must be considered in the context of the other documents because the series of documents is one transaction. If not, one must contemplate the parties' stopping after any of them, but the transaction is only intelligible on the footing that as soon as the first lease was executed, irrespective of whether Fork was brought in or not, the scheme had to be carried through to the end.

In *John Foster & Sons Ltd.* v. *Inland Revenue Commissioners*[7] Kay J.'s views were not accepted by the Court of Appeal. *Cohen and Moore* v. *Inland Revenue Commissioners*[8] has been distinguished recently but not doubted. All the elements of a sale are present in this transaction. There was a vendor (Oddfellows), a purchaser (Fork or Littlewoods), property sold (the freehold) and money consideration (£424,444) payable over 22 years).

Danckwerts J. sought to distinguish this case from *Portman (Lord)* v. *Inland Revenue Commissioners*[9] on the ground that there was no antecedent contract, and there is, admittedly, no evidence of an enforceable contract or any contract at all, but the parties must have agreed verbally before instructions were given to counsel. The instructions to counsel were not produced and could not be demanded as discovery is not available in these cases. Probably he was told that the lessees would be willing to pay an enhanced rent for a shorter period if the leaseholders would sell the freehold. The parties must have agreed that each step in his scheme would be carried out. In the *Portman* case [10] there were two transactions, and in *Oughtred* v. *Inland Revenue Commissioners* [11] only one. The transaction here was not framed as a sale, but although duty is leviable on instruments and not on transactions, the court is not debarred from inquiry as to the true nature of an instrument. Liability to stamp duty as on a sale is not dependent on whether there was a preceding agreement, so long as the over-all arrangement was designed to deal with the freehold for a price. There are many cases where the conveyance is the first document that comes into existence following a preceding oral contract. This was not a case where the party having the freehold entered into a contract with the leaseholder. This lease and underlease were definitely created for the purpose of the scheme.

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[3] [1908] A.C. 92; 24 T.L.R. 257, H.L.

[4] [1960] A.C. 206, 232; [1959] 3 W.L.R. 898; [1959] 3 All E.R. 623, H.L.

[5] [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345, H.L.

[6] [1940] 2 K.B. 282; 56 T.L.R. 877; [1940] 3 All E.R. 279.

[7] [1894] 1 Q.B. 516, 524; 10 T.L.R. 152, C.A.

[8] [1933] 2 K.B. 126.

[9] (1956) 35 A.T.C. 349.

Logically all exchanges are conveyances. In *Great Western Railway Co.* v. *Inland Revenue Commissioners* [12] the transaction was a sale and may also have been an exchange. A transfer of shares for other shares was held to be a sale in *J. & P. Coats Ltd.* v. *Inland Revenue Commissioners*,[13] and it was said that "exchange" was limited to real property.

Section 56 (2) is unrestricted in its terms and is apt to describe a rent payable under a lease.

Alternatively, if this was not a periodic payment within section 56 (2), the consideration for the conveyance was the value of the lease: Sargeant, p. 93. The value of the lease is not necessarily the same as the value of the rent discounted. Section 57 deals with special cases but does not cut down the general heading.

The transaction effected by the so-called "deed of exchange" was not an "exchange or excambion." Exchange should be limited to exchanges of real or heritable property. Blackstone in the Commentaries, vol. 2, 21st ed., p. 273, says that "An "exchange is a mutual grant of equal interests. . . ." In the Act of 1815 "exchange" was clearly confined to heritable subjects. The Acts of 1870 and 1891 were consolidation Acts, but in the Act of 1870 it is not entirely clear what was consolidated and the later Act did not consolidate the Act of 1815. There is no indication in either Act that the meaning of "exchange" was to be extended. The ordinary meaning of exchange may, of course, be wider, and in one sense every conveyance may be said to be an exchange of money for land, but the relevant question is the meaning for stamp duty purposes. If the legislature had intended to repeal the provision of the Act of 1815, it would have done so expressly. If "exchange" is not limited to exchanges of freehold for freehold, there is a lacuna, for the Acts contain no provision analogous to section 73 charging duty on money paid for equality on an exchange of leaseholds. Danckwerts J. said that the principle cited from Blackstone was no longer applicable, and he apparently relied on a note, but it is submitted that that note was unsupported by authority. From the standpoint of the whole transaction, this was a conveyance of the freehold interest on a sale. It is nihil ad rem that in some senses it may be said that it also had the qualities of an exchange. *Speyer Bros.* v. *Inland Revenue Commissioners*[14] is applicable.

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[10] 35 A.T.C. 349.

[11] [1960] A.C. 206.

[12] [1894] 1 Q.B. 507, C.A.

[13] [1897] 1 Q.B. 778; 13 T.L.R. 548.

E. Blanshard Stamp followed.

Peter Foster Q.C. and *K. B. Suenson-Taylor* for Littlewoods. The effect of Thursday's deed was, first, to pass the property from Oddfellows to Fork—the fee simple subject to the new lease of 22 years plus 10 days at £6 per annum, and, secondly, to effect the exchange from Fork to Oddfellows of the new lease subject to and with the benefit of the underlease to Littlewoods at the rent of £42,450. These interests in the land were being exchanged. There is no suggestion that any money passed, and one cannot spell out of this a conveyance on sale. The scheme between the parties was as set out in the letter of May 1. Even if, contrary to this submission, there was a sale of the fee simple, the bargain was not 22 payments of £42,444 as the Crown suggest, but £19,000 per annum for 22 years with a release from the rent payable under the old lease and the fee simple at the end of the period. The Crown's submission that the consideration was £848,000 disregards the value of that original lease. If the deed is not a conveyance on sale, it is either a deed of exchange or a deed under the heading "deed of any kind what-"soever not described in this schedule" which is also stamped at 10s. It may be a transfer of the fee simple but not a conveyance on sale. If the consideration for a transaction is not a price

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[14] [1908] A.C. 92, H.L.

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in money or money's equivalent, such as a debt or marketable security as provided for by sections 55 to 57 of the Act, the transaction is not taxable under this schedule as a conveyance on sale, even though it might ordinarily be so described: *J. & P. Coats Ltd.* v. *Inland Revenue Commissioners* [15] and *Jopling* v. *Inland Revenue Commissioners.*[16] If "conveyance on sale" has to be given the wide meaning suggested by the Crown, no documents would be stampable as "exchanges."

For the purposes of this Act an agreement to sell a house, for example, for bottles of claret, would not be a sale, despite the intention of the parties or the form which the transaction took. Section 6 deals with the case of foreign money. The exchange of goods for goods is barter and is not a conveyance on sale for stamp duty purposes: *Aldridge* v. *Johnson.*[17] The only consideration for the fee simple is the transfer of the leasehold interest. The rent payable under the underlease cannot be part of the consideration because that benefit attaches to the leasehold interest which is the consideration itself: *Swayne* v. *Inland Revenue Commissioners.*[18] The question is whether in substance and reality this was a sale of the freehold for the payment of an annual sum, though the form which the payment took was disguised as rent payable under a lease created for that very purpose. There is no reason why the whole scheme should be looked at, but, even if that is done, there was no bargain to sell the fee simple. All the correspondence was put in and the early stages are as set out in the letter of May 1. It has not been possible to get the instructions given to counsel. Stamp duty is a duty on instruments, but, provided a document operates bona fide according to its tenor, duty is ascertained according to the form and effect of each document. The conveyancer went out of his way to minimise stamp duty and the device used was not capable of much simplification if the scheme was to be effective. The court may look beneath the surface of a transaction to see whether the substance is in accordance with the form. That was the issue in *Oughtred* v. *Inland Revenue Commissioners* [19] and *Portman* v. *Inland Revenue Commissioners.*[20] The legal effect of all these documents is exactly in accordance with the form. The principle in *Cohen and Moore* v. *Inland Revenue Commissioners* [21] is not applicable here. *Homeleigh Holdings Ltd.* v.

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[15] [1897] 1 Q.B. 778.
[16] [1940] 2 K.B. 282.
[17] (1857) 7 E. & B. 885.
[18] [1899] 1 Q.B. 335; 15 T.L.R. 133.
[19] [1960] A.C. 206.
[20] 35 A.T.C. 349.
[21] [1933] 2 K.B. 126.

Inland Revenue Commissioners[22] is the latest statement of principle, though the facts were very different.

Mr. Bathurst's alternative point that the consideration was the actual value of the lease was not taken in the notice of appeal. "Value" is only relevant where one is considering cases where money's equivalent comes in, otherwise it could be argued that one freehold was the consideration for the value of the other. An exchange is unlikely to be a commercial transaction. This transaction was merely a rearrangement of interests in the property. It is conceded that on the old law, as distinct from equity, an exchange was of like for like, but things have changed and it is not conceded that this is not an "exchange." The Act, admittedly, makes no provision for duty to be charged on money paid for equality of exchange of leaseholds, but the court should not be led to close that lacuna by restricting the meaning of "exchange." This is not a conveyance on sale and it is immaterial whether it is an exchange. If it is a conveyance on sale and also an exchange, then it is conceded that, as in *Speyer Bros.* v. *Inland Revenue Commissioners*,[23] duty would be payable.

K. B. Suenson-Taylor following. If "value" in the First Schedule has the meaning which the Crown attribute to it, sections 55 and 57 would be otiose. "Value" is a relevant factor only in the express cases mentioned in those sections. [Counsel referred to the statement in Sheppard's Touchstone that "ex-"change" was limited to the mutual grant of equal estates, and said that the old common law rules no longer applied in 1891 and that "exchange" should now be given its ordinary, wide meaning.]

B. L. Bathurst Q.C. in reply. It has never been suggested that the consideration for the sale was £848,000. That sum derives entirely from section 56 (2), and if the court is against the Crown on the first point, then the value of the lease, £400,000, should be substituted for it. Section 56 (2) is entirely artificial. Once the periodical payments are for more than 20 years, one does not look beyond that. It is not suggested that the payment for the period within the section is the value. The consideration for the conveyance of the leasehold from Oddfellows to Fork can be ascertained by looking at the whole of the arrangement between the parties. All the documents preceding the deed of exchange were executed for the express purpose of creating an obligation for the guaranteed payment to Oddfellows of £42,444.

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[22] (1958) 37 A.T.C. 406.

[23] [1908] A.C. 92.

The lease of Littlewoods, which they surrendered, could have been taken into account as part of the consideration if the transaction had been carried out in the simple way. But, as in the *Homeleigh* case,[24] if the parties chose another way they have only themselves to blame. The intention was to save stamp duty. There is no warranty for cutting down the meaning of "value" to the specific cases mentioned in sections 55 and 57. "Value" means any consideration and those sections deal with the ascertainment of it in certain cases, but it does not follow that in section 55 (1) "value" has to be limited to money or those specific examples. That would not fit with section 6. In *Oughtred* v. *Inland Revenue Commissioners*[25] the consideration was the value of the son's reversion. One cannot go back before the Tuesday because Fork did not come into the picture until the lease was assigned to them on the Monday. The subject-matter transferred by them in the deed of exchange was not in existence until then. The court would, it is submitted, be more willing to conclude that this deed was a conveyance than to leave it to the sweeping-up provision. *Swayne* v. *Inland Revenue Commissioners*[26] has nothing to do with this. Counsel for Littlewoods said that "exchange" meant something different at common law, but *J. & P. Coats Ltd.* v. *Inland Revenue Commissioners*[27] was decided in 1897 and Wills J. in that case expressed the view, admittedly obiter, that the word was limited in meaning to the exchange of freehold for freehold. Section 55 (1) may be aimed at the case where shares are standing at a discount. Apart from that section it might have been arguable that the relevant value was the nominal amount. In section 55 (2) "security" is used in a different sense from stock exchange security, probably as a bond or debenture.

On the cross-appeal:

Peter Foster Q.C. and *K. B. Suenson-Taylor* for Littlewoods. Liability to duty on the assignment of the new lease from Littlewoods to Fork depends on whether the document has been taken out of the relief afforded by section 42 of the Finance Act, 1930, to associated companies from the duty imposed under section 74 of the Finance (1909–10) Act, 1910. Littlewoods owned all the issued shares in Fork, and they were, therefore, associated companies within section 42, but the exemption from duty under that section is not available if the beneficial interest was "conveyed "or transferred" within section 50 (1) (*b*) of the Finance Act, 1938. The onus is on the taxpayer to show that that section is inapplicable. It is submitted that the creation of a lease, as in this case, is not within the restricting section. A "transfer" can only be of an existing interest. "Conveyance" in the Act of 1938 should be given the limited meaning which it bears in the schedule to the Stamp Duty Act, 1891. The separate heading "Lease or Tack" in that schedule would be otiose if the word "conveyance" was wide enough to cover both interests. The Act of 1938 does not provide specifically that it is to be read with the Act of 1891, but section 50 must be subject to the same limits as the section which it restricts, and section 53 (4) of the Act of 1930 provides that Part IV of that Act (which includes section 42) has to be construed as one with the Act of 1891.

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[24] 37 A.T.C. 406.

[25] [1960] A.C. 206.

[26] [1899] 1 Q.B. 335.

[27] [1897] 1 Q.B. 778.

The ordinary meaning of "conveyance," as in section 205 (1) (ii) of the Law of Property Act, 1925, would cover the creation of a lease, but that cannot alter the meaning in the Stamp Act. The lease of Monday did not transfer or vest the interest in the purchaser. [Reference was made to *National Telephone Co.* v. *Inland Revenue Commissioners*[28] on the construction of "covenant."]

This assignment is not within the mischief of the section, which was intended to deal with dummy bridge transactions: see *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners*.[29] It was originally created in Littlewoods in order to effect a surrender of the old lease by operation of law.

[DONOVAN L.J. But this would enable the bridge company device to be used by substituting a long lease for a fee simple.]

A long lease would not come within the exemption of section 42 but would have to be stamped ad valorem. No duty has been lost in this case, for the first lease was so stamped. Fork was not a bridge company.

In *In re Sanders' Settlement*[30] a conveyance was distinguished from the creation of a lease. [*Credland* v. *Potter*[31] was also referred to.]

The whole point is whether this is saved by the dichotomy in the earlier Act of 1891 between conveyance or transfer and lease.

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[28] [1900] A.C. 1; 16 T.L.R. 58, H.L.

[29] [1958] A.C. 549; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406, H.L.

[30] [1896] 1 Ch. 480; 12 T.L.R. 232, C.A.

[31] (1874) L.R. 10 Ch. 8.

In both sections 54 and 62 of the Stamp Act, 1891, " transferred " only applies to instruments, and " vested in " only applies to decrees or orders of the court: see *Kemp* v. *Inland Revenue Commissioners*[32] (though in *G.H.R. Ltd.* v. *Inland Revenue Commissioners*[33] Macnaghten J. did not agree with the second of Phillimore J.'s reasons). Leases are dealt with in the group of sections beginning with section 75. *Goldsmiths' Co.* v. *Wyatt*[34] is helpful on how far a later Act can affect the construction of an earlier Act, but the present is a stronger case.

B. L. Bathurst Q.C. and *E. Blanshard Stamp* for the Crown. Prima facie statutory words should bear their ordinary meaning: *Credland* v. *Potter*.[35] Blackstone, vol. 2, at p. 317, on " Alienation by deed," says that a lease is properly a conveyance of any lands or interest. The definition in the Law of Property Act, 1925, is similar to the Act of 1881, and under the general law the term " conveyance " plainly includes a lease. *In re Sanders' Settlement*[36] dealt with quite a different matter. Prior to the Real Property Act, 1845, the normal way of conveying land was by lease and release, but by 4 & 5 Vict. c. 21 a release was made as effective as the old procedure. " Lease " was plainly only a smaller interest in property.

Even if, as the taxpayer submits, the Act of 1938 should be read with the Act of 1891, that is no reason for ignoring the general law as to the nature of a leasehold interest when considering what operations the Act of 1938 was aimed at. The problem is not whether the document should be stamped as a lease but whether it is within the particular words of section 36—whether in pursuance of an agreement the beneficial interest in the property had been previously transferred. This is a voluntary conveyance which by section 74 of the Finance (1909–10) Act, 1910, is to be deemed to be a conveyance on sale and stamped ad valorem. Under section 74 a long lease at a peppercorn rent has to be stamped as if it were a sale of the term on the value of the lease. The commissioners considered whether the first document should be stamped as a conveyance, but they took the view that, although the document had a big element of gift in it, it could not have been intended as a voluntary disposition, for that would have been beyond the powers of the friendly society, so they decided that the document was all part of the arrangement. If this lease is outside the Act of 1938, the ridiculous state would be reached that conveyances of freeholds would be within section 42 of the Act of 1930 and caught by the Act of 1938 but a 999-year lease would escape. But section 62 of the Act of 1891 provides that the carving out of a term of years is a transfer of property. The lease must be a document which vests property in the lessee. Phillimore J.'s reasoning in *Kemp* v. *Inland Revenue Commissioners* [37] was wrong.

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[32] [1905] 1 K.B. 581; 21 T.L.R. 168.

[33] [1943] K.B. 303.

[34] [1907] 1 K.B. 95, 105, C.A.

[35] L.R. 10 Ch. 8.

[36] [1896] 1 Ch. 480.

Leases may be chargeable under more than one section in the Act of 1891, but it would be drastic to say that therefore "conveyance" should be limited to exclude application to leases or to say that section 50 cannot apply in a context where there is no question of stamping that document. The court would only seek to stretch the language to reach a desirable result, but this cuts right across the mischief of the Act of 1938 and, as Lord Denning said in *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners*,[38] one is entitled to consider what is the mischief of the Act. The onus is on the taxpayer to show to the satisfaction of the commissioners that the document is outside the Act of 1938.

It has been conceded that the assignment was executed in pursuance of an arrangement within section 50.

Where there are a number of Acts which deal with the same subject-matter, prima facie one gives words the same meaning in all of them, but the terms of the Act of 1891 do not themselves limit "conveyance" to exclude leases. This may involve the result that the commissioners could stamp leases as conveyances, but then, as in *Speyer Bros.* v. *Inland Revenue Commissioners*,[39] they can choose under which head they will levy duty. Bearing in mind the mischief of the Act of 1938 and the absence of any provision that it should be read with the earlier Act, there is no reason why the words should not be given a slightly different meaning, particularly as that would be the ordinary normal meaning. The beneficial interest for the purpose of section 50 of the Act of 1938 is the lease. "Previously conveyed or transferred" is not the same as "conveyance." In section 54 "any estate or "interest" must include a lease; "conveyance" is not limited to freehold interests there; and in the Act of 1938 one has not even got the word "conveyance." Even if in the Act of 1891 "conveyance" had to be given a limited meaning, that is no reason for limiting this different phrase so as to produce a nonsensical result.

[37] [1905] 1 K.B. 581.

[38] [1958] A.C. 549.

[39] [1908] A.C. 92.

E. Blanshard Stamp, following, referred to *Fendoch Investment Trust Co.* v. *Inland Revenue Commissioners*[40] on the construction of the latest of a series of Acts. The taxpayer's argument is the same as that put by Pennycuick Q.C. in the Court of Appeal and House of Lords in *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners*,[41] and it was rejected unanimously. It was not put in quite the same way before Danckwerts J., for it was not conceded there that normally and apart from stamp duty contexts " conveyance " would include a lease. The agreement in *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners*[41] can be equated with the lease here. The instrument in both cases was not a conveyance in the ordinary or stamp duty sense, but " conveyed or transferred " was held to cover something happening as a result of the agreement vesting by operation of law. The scheme of the Act of 1938 was to exclude relief where either the property or the consideration came from an outsider not within the umbrella of the company (as Oddfellows were in the present case). The exemption afforded by section 42 is only to operate where the arrangement is a truly domestic affair within the family of companies. The language used should be given a wide meaning to attain that end. This is not a taxing statute.

Peter Foster Q.C. replied.

LORD EVERSHED M.R. We have heard two appeals, and this judgment is my judgment upon both.

The appeals have raised problems under the stamp duty legislation of no little difficulty, and we are much indebted to counsel for their assistance and, upon some points, for interesting historical references; but in the end I have come to the conclusion that we should not differ from the decision of Danckwerts J. upon either appeal.

The facts are set out in the case stated, and the exhibits to the case. I must, however, briefly refer to the circumstances, particularly since in the first appeal the question has been raised, what in truth was the transaction effected by the instruments in question.

In the year 1958 the Independent Order of Oddfellows, to whom I will refer hereafter as the " Oddfellows," were the freehold owners of premises in Oxford Street, London, known as Jubilee House. The premises were subject to a lease made in the year 1947 for 99 years in favour of Littlewoods Mail Order Stores Ltd., hereafter called "Littlewoods." The lease would, therefore, expire in 2046. The rent payable under the lease was £23,444. It is not in doubt that the rent which I have mentioned was considerably less than the rent which the premises would have commanded in the market, if vacant, in 1958.

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[40] (1943-45) 27 T.C. 53, 68.

[41] [1958] A.C. 549.

Negotiations, therefore, began in the early part of that year, and their nature is stated in a letter written by Littlewoods' solicitors on May 1, 1959, addressed to the Controller of Stamps, in answer to his question what the transaction was, and is as follows:

"In actual fact, however, the 'proposed transaction' which "you mention in your letter was one discussed at a meeting "between our clients and the said [Oddfellows] which took place "[in] March, 1958. At that meeting, it was suggested by the "freeholders that the lease of 1947 for a term of 99 years at a "rental of £23,444 should be surrendered by operation of law "and that a new lease be granted for a term of 22 years only at a "rental of £42,444, i.e., an increase of £19,000 per annum.

"At that meeting, it was also suggested that the said [Oddfellows] should cease to receive rent at the expiration of the "proposed new lease for 22 years and that our clients [Littlewoods] should be entitled to complete possession of the property "thereafter without any further payment of rent."

Put otherwise, then, the nature of the proposed arrangement was that Oddfellows were to get a much larger rent for a shorter period and, subject thereto, that the property would belong exclusively to Littlewoods. In answer to a question which we put to him, Mr. Bathurst was kind enough to find out and tell us that the monetary value of the remaining 88 years' payments of £23,444 at that time could be taken to be £460,000 after discounting in the usual way, and that, similarly, the then present monetary value of 22 years' payments of £43,444 was £560,000, or £100,000 more. The figures are of some interest as showing that the transaction proposed was not as unfavourable to Oddfellows as at first blush it might have appeared.

At that stage, the matter was sent to conveyancing counsel of agreed selection. The instructions to conveyancing counsel were never produced, and this was a matter of a little criticism. In fairness, however, to Littlewoods I feel clear in my own mind that nothing more would have emerged which is significant had those instructions been produced; in other words, that there never was anything more behind the transaction than the statement of it which I have already made.

Conveyancing counsel proceeded to draw the necessary documents in forms which I shall presently mention, and having, no doubt, an eye upon liability to stamp duty. But so long as the instruments in question really effected what they purported to do, there is, as is well established, nothing wrong in so contriving them that they minimise the liability to duty. In a case to which I shall allude on the other appeal, *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners*,[1] Viscount Simonds gave expression to the well-known principle: "I would remind your "Lordships," he said, "that instruments, not transactions, are "liable to stamp duty." It is, however, of course nonetheless proper for the court to see what in truth the instruments do effect.

There was at this stage a change introduced into the proposed transactions which I have stated. Instead of Oddfellows remaining freeholders for 22 years, they parted with their freehold interest at once, and took a lease themselves for 22 years and 10 days, Littlewoods becoming sub-lessees of Oddfellows at the proposed enhanced rental of £42,444 net; that is to say, after deducting the £6 per annum payable under the head lease. To effect that change there was introduced into the matter another company known as Fork Manufacturing Co. Ltd., a company wholly owned by Littlewoods.

The introduction of that company (and its name) may be said to have added somewhat to the piquancy or, indeed, if I may borrow my brother Harman's word in another case, the "wizardry" of the transaction. It is, however, a fact that, although only two of the 20,000 shares of Fork Manufacturing Co. Ltd. were ever issued, it was not formed then and there for the purpose. We were informed by Mr. Foster that it had been in existence for some 10 years and was, in fact, a trading company.

On Monday, December 8, 1958, and on the five succeeding days, documents were executed, one each day, six in all. I will state shortly the nature of the documents. On Monday, December 8, a lease was granted by Oddfellows to Littlewoods for 22 years and 10 days at the rent of £6 per annum. It has been conceded (and authority was referred to in Halsbury's Laws of England, 3rd ed., vol. 23, p. 686) that that instrument operated in law to effect a surrender of the outstanding term of the 99 years' lease.

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[1] [1958] A.C. 549, 558; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406, H.L.

On Tuesday, December 9, the new lease was assigned by Littlewoods to the Fork Company.

On Wednesday, December 10, Fork granted an underlease of 22 years (that is, 10 days less than the term of the head lease) to Littlewoods at a rent of £42,450 per annum.

On Thursday, December 11, was executed what is called a "deed of exchange" between Oddfellows and Fork, the effect of which was that Oddfellows assigned to Fork the freehold reversion and Fork assigned to Oddfellows the new lease of December 8, with the benefit of the underlease.

On Friday, December 12, was executed a deed of guarantee whereby Fork guaranteed the payment by Littlewoods of the rent of £42,450, and charged its own freehold reversion as security for the performance of that covenant.

Finally, on Saturday, December 13, by deed of indemnity, Littlewoods indemnified Oddfellows against any stamp duties that might be exigible in respect of any of the instruments. It is, therefore, Littlewoods who appear as the appellants in the second appeal, and as respondents in the first. We are concerned in the two appeals with the instruments of Tuesday, December 9 (the assignment of the new lease to Fork) and of Thursday, December 11 (the so-called deed of exchange).

Perhaps not unnaturally, in the course of the argument the two documents were referred to respectively as "Tuesday's child" and "Thursday's child." Since the argument concluded I have been able to refer to the ancient rhyme, and I find that "Tuesday's "child is full of grace," but "Thursday's child has far to go"—a description which may, or may not, be thought appropriate by the Crown.

The first appeal relates to the deed of exchange, of Thursday, December 11. The parties to it were certain individuals being the then trustees of the Oddfellows, of the one part, and Fork of the other part. [His Lordship referred to the recitals and read clause 1, commenting that the reference to the original 99 years' lease, registered under leasehold title LN 58308 (to which the transferred freehold was expressed to be subject), had apparently been mentioned in error as that lease had, in fact, been surrendered and ceased to exist, and Fork never had had any interest in it. His Lordship then read clause 2, referred to the covenant by the trustees of Oddfellows with Fork to pay the head rent of £6 per annum, and continued:]

On the face of it, the document is stated to be a deed of exchange. But it is the essential argument of the Crown that it was in truth, for the purposes of stamp duty legislation at any rate, a conveyance on sale. The view of Danckwerts J. was that it was a deed of exchange as that phrase is used in the schedule to the Stamp Act, 1891. In a business sense it is no doubt true that it was an exchange, and it is, indeed, so described. That, however, is not the end of the matter. It is necessary to refer to the first schedule to the Stamp Act, 1891. It is convenient at this point to observe that by section 1 of the Act of 1891 it is provided that "From and after the commencement of this Act the stamp "duties to be charged . . . upon the several instruments specified in "the first schedule to this Act shall be the several duties in the said "schedule specified . . ." There is found in the schedule a long list of headings or titles descriptive of various types of instrument which includes "conveyance or transfer" and after some subheadings to which I must later return, "exchange or excambion— "instruments effecting. In the case specified in section 73 *see* "that section."

It is not in doubt that "excambion" is a term of Scots law, and may be taken to be equivalent to "exchange," although its exact significance is not a matter upon which we have any expert opinion, and it is not, therefore, one on which I shall say anything. There is, however, little doubt that in its origin the word "exchange" as applied to property transactions relates to exchanges of freehold, or at least to exchanges of property of a like estate or character. Mr. Bathurst referred us to the Commentaries of Blackstone, vol. 2, 21st ed., p. 273: "An exchange "is a mutual grant of equal interests, the one in consideration of "the other. . . . The estates exchanged must be equal in quantity, "not of value, for that is immaterial, but of interest, as fee simple "for fee simple, a lease for twenty years for a lease for twenty "years, and the like." There is a note which in some degree, but not substantially, may be said to qualify that statement. It is, of course, to be noted that in the present case the estates exchanged were not similar in interest; on the one side there was freehold, on the other a leasehold interest.

Mr. Bathurst also referred us to earlier stamp duty legislation, beginning with the Act of 1815, from which it appears at the least highly probable that at that date "Exchange" was used in the limited sense stated in Blackstone's Commentaries.

I add two other references. It will be recalled that the schedule made a reference to section 73. That applies to the case of an exchange of real or heritable property for other real or heritable property where additional consideration by way of equality of exchange is given. Of course, if the word "exchange" extended to exchanges of other than real or heritable property, it would appear that there would be a hiatus in the statutory scheme, for there is no express provision for the case of an exchange of other interests where a sum of money is paid by way of equality.

Finally, some century-and-a-half after Sir William Blackstone's day, Wills J. in *J. & P. Coats Ltd.* v. *Inland Revenue Commissioners* [2] said: "But certainly, looking at the history of the matter "as disclosed to us and the Act of 55 Geo. 3 (that is the Act of "1815) and subsequent Acts, there is considerable ground for "arguing that 'exchange' really was intended to apply to real "property and not to go beyond it." He then referred to the Scottish term "Excambion," as probably having a similar limitation.

In the view that I have formed it is unnecessary for me to express an opinion whether in the Stamp Act, 1891, this word "exchange" should be taken as limited in the sense used by Sir William Blackstone. It is to be noted in reference to the Crown's argument that, taken to its full, logical conclusion, it would appear to follow that every exchange would be also a conveyance on sale, since it could always be said that there was a consideration for the transfer by party A, consisting of the property transferred by party B. Indeed, Mr. Bathurst said that if the instrument here in question was a conveyance on sale, he was not concerned that it might also be an exchange, since (and there is established authority for this proposition) it would be open to the Crown to charge the greater of the duties applicable. The real question for us to decide is, then, did this document effect a conveyance on sale? If the answer to that question be in the negative, it is sufficient to justify the conclusion I have already stated; for the result would be the same whether the document is then treated as a conveyance or transfer other than a conveyance on sale, or as an exchange.

Although the Stamp Act, 1891, contains a definition of "conveyance on sale" (in section 54, to which I shall have to return at a later stage in this judgment) there is nowhere any definition of the word "sale." I apprehend, therefore, that the court in deciding whether there is a sale must apply the ordinary standards of sense and language to the transaction under review. The question then here is, who was selling what, to whom, and for what price or consideration?

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[2] [1897] 1 Q.B. 778, 784; 13 T.L.R. 548.

The answer of the Crown, put forward by Mr. Bathurst with great force, is that in truth Oddfellows were selling the freehold to Fork (Littlewoods' subsidiary) and the consideration was the payment to Oddfellows by Littlewoods of 22 annual payments of £42,444, a figure arrived at by deducting the rent of £6 under Monday's lease from the rent under the sub-lease. Mr. Bathurst also conceded in reply that, as an alternative, the price or consideration might properly be stated as 22 annual payments of £19,000, being the difference between £42,444, the net rent under the new sub-lease, and £23,444, the rent under the original long lease.

Thirdly, and again alternatively, Mr. Bathurst contended that the consideration for the sale of the freehold by Oddfellows was the value of the lease transferred by Fork to Oddfellows which, for the purposes of these appeals, is to be taken as agreed, in accordance with the case stated, at the sum of £400,000.

In my judgment these submissions do not represent what the Thursday's instrument, the so-called deed of exchange, in truth effected. I refer again to what I have cited from Viscount Simonds, that the duty is leviable upon the instrument. It is, however, no doubt true, and I have already so stated, that one must see what was the transaction which in truth the instrument effected.

I refer again to the facts which I have earlier stated, and my conclusion that there was no other bargain behind these instruments which in truth was the bargain effected by this document. At its highest, from the Crown's point of view, as it seems to me, this so-called deed of exchange represents an essential stage in the arrangement made, whereby Oddfellows received the benefit of the underlease with a rent nearly twice as good as the old lease rent, but parted altogether with their freehold interest, so that that interest vested in Fork, which was Littlewoods' subsidiary.

I observe that Mr. Bathurst did concede in reply that if it was proper (and I take it that it is) to have regard to what was the transaction which these deeds really effected, if one can look behind them to find that transaction, one cannot go back at any rate earlier than the evening of Monday because until that evening the subject-matter transferred by Fork had not come into existence. But in my judgment the truth is that Oddfellows could not, and cannot, fairly be said to have been selling the freehold for 22 annual payments either of £42,444 or of £19,000 or, indeed, of any other such sum. I do not think it can be said to be any more true that Oddfellows were selling the freehold for annual sums than it would be true to say that Fork was selling its 22 years and 10 days lease for the value of the freehold.

That brings me at once to Mr. Bathurst's alternative submission, namely, that this was in truth a sale of the freehold, the consideration being the value of the lease. Again I have to say that I do not think that that is what the instrument effected. If it were otherwise, it might indeed seem to follow that here there were two sales, on the one side a sale by Oddfellows of the freehold for the value I have stated, £400,000, and at the same time a sale of the lease by Fork for the value of the freehold reversion, whatever that might be. If that were the truth, the case might be then said to be parallel to one of the cases to which we were referred, *Portman (Lord)* v. *Inland Revenue Commissioners*.[3] But that case had this quite clear character of distinction from the present one, for in that case Lord Portman had entered into a firm and binding contract for the sale of certain property for £1,460,000 and also, at an interval of some four days, had entered into another binding contract to buy from the other party, an estates company, other property for £1,280,000. It was sought to say that in truth this was an exchange, and that duty was only leviable upon the difference between the two sums I have stated. But the judge held that there were there two sales at the figures I have mentioned, and that stamp duty was leviable upon the total of the two sales. In my judgment that case has no application to the present.

Many other cases were referred to, and I shall not, I hope, be thought disrespectful of counsel if I do not now allude to them. I think the matter in the end of all is one not admitting of great elaboration; applying what I have hoped to be the ordinary standards of sense and language I conclude that this document was not a conveyance or transfer on sale. Looking fairly at the so-called deed of exchange, it seems to me, that as an instrument it does not, either in terms or in effect, satisfy the necessary requirement of a sale. I cannot find or divine the essential characteristics of a sale, namely, the presence of a buyer, a seller, something sold and a price or consideration for what is sold.

I turn accordingly to the cross-appeal by Littlewoods. That relates to Tuesday's child—described " as full of grace "—and by this instrument there was assigned by Littlewoods to Fork as a voluntary assignment the lease, granted the previous day, of 22 years 10 days, subject to the rent of £6 per annum. The document is short. It recites the lease that I have just stated; it recites that Littlewoods are the beneficial owners of the whole of the issued share capital of Fork; it recites that Littlewoods have requested Fork to accept the transfer of the property, and the operative part is to the effect that Littlewoods as beneficial owners assigned to Fork the premises comprised in and demised by the lease of December 8, 1958, to hold the same unto Fork for the residue of the term, subject to the payment of the rent.

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[3] (1956) 35 A.T.C. 349.

The point again is an exceedingly short one in the last resort, for it turns upon the construction of a few words in section 50 of the Finance Act, 1938. I shall have to refer to the whole of the relevant part of the section, but the particular words which are involved in the appeal are: " . . . whereunder . . . (*b*) the " beneficial interest in the property was previously conveyed or " transferred directly or indirectly by such a person as aforesaid."

It is the case of Littlewoods that those vital words, " conveyed " or transferred " in the sentence which I have read, in that context—that is, the context of that Act and other stamp duty legislation—mean conveyed or transferred by an instrument called, or defined as, a conveyance or transfer in the schedule to the Stamp Act, 1891, wherein such instruments are distinct from leases. It will be recalled that here the subject-matter transferred by the sale was the lease which had been granted—that is, created—the day before. It cannot, I conceive, be at all in doubt that the word " conveyance " or " convey " will, to a lawyer at any rate, properly include a lease or the grant of a lease. In modern times that construction may be said to be enshrined in the definition to be found in section 205 (1) paragraph (2) of the Law of Property Act, 1925; but it is indeed of much older significance.

Mr. Bathurst again referred us to Blackstone's Commentaries, vol. 2, p. 317, " A lease is properly a conveyance of any lands " or tenements." Reference was also made to the old conveyancing practice by way of lease and release. But it was Mr. Foster's submission that nonetheless this section is part of the stamp duty legislation and, so treated, " convey " or " transfer " must be construed in the limited sense used in the schedule so as to exclude a lease.

I have already referred to section 1 of the Stamp Act, 1891, and it is right to observe that, as I have already indicated, leases, or rather the heading " Lease or Tack " is a separate head or

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description of instrument from conveyance or transfer. As I am referring to the first schedule, I note also, since it will be relevant to something which I shall say later, that another separate head or series of heads bear the name or word "Agreement," either alone or in conjunction with contracts and, in one instance, memorandum of agreement. But Mr. Foster says it is not merely that there is this dichotomy in the schedule which is introduced into the scheme of the Act by the first section. He has referred also to other parts of the Act which, he says, emphasise that dichotomy. Thus, a group of sections beginning with 54 and ending with 61 is headed "Conveyances on Sale." There follows section 62, "Conveyance on any Occasion except Sale or Mort-"gage"; and then, turning a little further on, there is a group of sections beginning with 75, bearing the title, "Leases." So, again, says Mr. Foster, Parliament is emphasising this essential dichotomy between two types of instrument for stamp duty purposes, conveyances or transfers on the one hand, leases on the other.

As I have referred to sections 54 and 62, I think it not irrelevant to notice that section 54, which gives the meaning of conveyance on sale, and section 62, which gives a definition of conveyances other than those on the occasion of a sale or mortgage, would appear, according to their ordinary language and the understanding of the word "conveyance,"etc., to comprehend also a lease. I will illustrate what I have said by reading from section 62: "Every instrument, and every decree or order of any "court or of any commissioners, whereby any property on any "occasion except a sale or mortgage, is transferred to or vested "in any person, is to be charged with duty as a conveyance or "transfer of property." The language follows closely that of section 54. Prima facie the language would cover the grant of a lease, since a lease is an instrument whereby property (namely, the term of the lease) is vested in some person (namely, the lessee). But in *Kemp* v. *Inland Revenue Commissioners*[4] Phillimore J. expressed the view, in reference to section 54, that it was necessary that the rule of construction sometimes called reddendo singula singulis should be applied, with the result that the word "transferred" in the phrase "transferred to or vested in," is related exclusively to the word "instrument," and the words "vested in" exclusively to decrees or orders of a court. The result of that view would be to exclude, necessarily, from section

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[4] [1905] 1 K.B. 581; 21 T.L.R. 168.

54 and equally from section 62 the grant of a lease, since one could not say that the subject-matter of the grant of a lease was "transferred." It is indeed created, and although the estate created would undoubtedly be vested in the lessee, the words "vested in" are, on Phillimore J.'s view, confined to the effect of decrees or orders.

Again, it is not necessary to express a conclusion upon this point, but I would like to record that I must by no means be taken as assenting to the view expressed by Phillimore J., and prefer, as at present advised, the doubts later expressed by Macnaghten J. in *G. H. R. Ltd.* v. *Inland Revenue Commissioners.*[4a]

Some other sections were properly referred to, and to them I shall make a brief allusion. By way of premise, I turn to the headings relating to conveyance or transfers in the schedule. The first is "Conveyance or Transfer" of certain stocks. The second is one which was fundamental to Mr. Bathurst's appeal, "Conveyance or Transfer on Sale" of any property except the stocks above mentioned, and there follows a reference to a number of sections, including 55 and 57. Then comes "Conveyance or Transfer by way of security," and one is referred back to the heading "Mortgage," and finally "Conveyance or "Transfer" of any kind not hereinbefore described.

Under the second heading, "Conveyance or Transfer on Sale," there is the important line (it was important to Mr. Bathurst's argument) "where the amount or value of the consideration for "the sale," either does or does not exceed, certain stated figures. Section 6 deals with the case which arose in the course of the argument, where the consideration, though monetary, was not by way of English currency. It deals in those circumstances with foreign currency. Section 55 tells how, for the purpose of calculating the duty, to value what is called (in subsection (1)) stock or marketable security, and (in subsection (2)) security not being marketable security. It may well be that a case will hereafter arise when the exact meaning of the word "security" will have to be considered. Section 57 deals with the case where the consideration is by way of a debt.

I think it unnecessary to refer to other sections, but there was some argument about the proper effect upon the general conspectus of the Act of those sections. It clearly cannot be said, I think, that the subject-matters which are dealt with in sections 6, 55 and 57 by any possibility comprehend all possible types of consideration upon a sale. It was, therefore, on the one hand said that when one is concerned with conveyance on sale within the schedule, and has to consider the value as distinct from the amount of consideration, these sections limit the cases to which the heading conveyances on sale applies at all. On the other side it is said that the sections I have quoted have a much more limited significance, only telling how in particular cases to value particular types of consideration.

[4a] [1943] K.B. 303, 305.

I think it may well be a criticism of the Act, if I may say so, that these problems are left somewhat in the air. It is one of the difficulties to which the Stamp Act gives rise. I have, however, this final word to add; that although, as I have said, section 54 contains a definition of a "conveyance on sale," a definition picked up, in a sense, by section 62 in the way of definition, when one comes to the group of sections headed "lease," there is nowhere to be found any definition of "lease" at all. So much for the Act of 1891.

I regret to have taken rather a time over it, but I feel it is not easy to do justice to the argument, and justify my conclusion, without these references, and I must turn to the next step in the legislative history, which is section 74 of the Finance (1909–10) Act, 1910. The section has the cross-heading "Stamp duty on "gifts inter vivos." Subsection (1) states, as far as relevant, "Any conveyance or transfer operating as a voluntary disposition "inter vivos shall be chargeable . . . as if it were a conveyance or "transfer on sale," and then it provides what is to be substituted for the consideration.

It was not, I think, doubted by Mr. Foster that if this case had come before the court after the Act of 1910 had come into operation and before the coming into operation of the later Act of 1930, the assignment, Tuesday's child, would have fallen within section 74 and been charged for stamp duty as a conveyance or transfer within the comprehension of that section. But it is said by Mr. Foster that although voluntary gifts by way of transfer were brought into the scope of that section, it was otherwise in the case of a gift in the form of a lease. That would be a strange omission if it be right. It would appear anomalous that if Parliament was concerned to say that transactions by way of gift would attract duty as if made for a consideration, it should confine its attention to conveyances and transfers (as Mr. Foster construes those terms) and say nothing about leases. If that was so, there would be, as I say, an anomaly. It may fairly be said that such a result is unlikely. But it may also be said and must be said if the anomaly is to be avoided that Parliament in 1910 had not in mind the rigid dichotomy between conveyance and transfer on the one hand and lease on the other which is the foundation of Mr. Foster's argument.

I turn next to the Act of 1930. Section 42 of the Act of 1930 proceeded to exempt from duty certain conveyances and transfers. In this case there is no doubt that Parliament had in mind the dichotomy, because the reference is to duty under the heading "Conveyance or Transfer on Sale" in the first schedule to the Act of 1891. The operation of the schedule is expressly confined to cases otherwise falling under that heading. Subsection (1) states that stamp duty shall not be charged on an instrument to which the subsection applies, and subsection (2) applies the section to any instrument which satisfies the two conditions, (*a*) that its effect is to convey or transfer the beneficial interest in property from one company with limited liability to another, and (*b*) (as far as relevant to this case) that not less than 90 per cent. of the issued share capital of one company is owned by the other.

It is also to be noted that the section which is in Part IV of the Act is, by the express terms of section 53, to be construed as one with the Stamp Act, 1891. By way of reminder I note that we are here concerned with a transfer of property for no consideration from Littlewoods to a wholly-owned subsidiary. If, therefore, the case had come before the court after 1930 but before 1938, there would appear to be little doubt that the assignment would be exempt from duty. And so I come to the Act of 1938, to which I earlier alluded, and I must now refer to it, or to the relevant section of it, at slightly greater length.

Subsection (1) of section 50 refers in terms to section 42 of the Act of 1930, and states its purpose as having been to relieve from stamp duty any instrument the effect whereof is to convey or transfer the beneficial interest in property from one associated company to another. The subsection proceeds to provide that section 42 of the Act of 1930 shall not apply to any such instrument unless it is shown to the satisfaction of the Inland Revenue Commissioners that the instrument was not executed in pursuance of or connected with an arrangement whereunder—and we are concerned with (*b*)—"the beneficial interest in the property was "previously conveyed or transferred directly or indirectly by such "a person as aforesaid." "Such a person as aforesaid" means some person not associated with the transferor or the transferee —someone who has been conveniently called a stranger.

If I may, by way of reminder, state again the essential fact, in the present case there was a grant of a lease by Oddfellows to Littlewoods, and then a transfer of that subject-matter by Littlewoods to Fork. There is no doubt that Oddfellows are a " stranger "; they are " such a person as aforesaid " within the meaning of the subsection. It is to be noted that, unlike the Act of 1930, Parliament on this occasion did not for some reason see fit to provide that section 50 of the Act of 1938 should be read and construed as one with the Stamp Act, 1891. I accept, however (although the omission I think is not entirely without significance), as a general, well-established proposition that, in an Act of Parliament which amends existing legislation on a particular subject-matter, the court will construe the terms of the amending Act in the sense which they bear, or have been held to bear, in the main legislation.

Observe, then, what the Act demands. It must be shown to the satisfaction of the commissioners (the onus being, as Mr. Foster concedes, upon Littlewoods) that the transaction was not executed as part of an arrangement. That is the first condition. It is conceded for present purposes that the words in paragraph (*b*), " previously conveyed," are limited by reference to the " arrangement " earlier referred to. There is no question here that if one can treat the grant of the lease as a conveyance or transfer, it was within the phrase " previously conveyed " because it was all part of a single arrangement. But there remains the second condition contained, for present purposes, in paragraph (*b*) under which arises the vital question: in this paragraph do the words " conveyed or transferred " comprehend a lease, or do they not?

I think again the point is one of no little difficulty. I observe, however, that if Mr. Foster is right, it would seem to be a somewhat strange anomaly, a casus omissus. It would seem strange to exclude from the benefit of section 42 of the Act of 1930 the transfer of something granted by way of conveyance or transfer, as Mr. Foster defines these words, but not to exclude the transfer of something created by way of lease. It would leave, certainly, an easy loophole for avoiding the impact of section 50 of the Act of 1938. But in the end upon this matter, as on the other, I have come to the conclusion which commended itself to Danckwerts J. The essential words are, " The beneficial interest in the property " was . . . conveyed or transferred." There is nothing in the section or elsewhere in the Act which in terms compels one to refer to the schedule to the Stamp Act, 1891. The section does not say "was conveyed or transferred by an instrument called a conveyance or transfer in the schedule to the Act of 1891." As it seems to me, when one bears in mind the meaning of the word "convey" in the ordinary legal sense, Mr. Foster's argument requires the ordinary sense of this sentence to be qualified by adding, in effect, the qualification I have mentioned, "conveyed "or transferred by an instrument called conveyance or transfer in "the schedule to the Act of 1891."

Again, I feel that much elaboration will not be of assistance, but I have been assisted in reaching the conclusion which I do reach by the reference made to the argument and decision in *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners* [5] to which I earlier alluded. The facts in that case it is necessary briefly to state. A Mr. Cohen had in his lifetime agreed to sell to company A certain property for a consideration consisting of shares in company A. The shares were allotted to Cohen, but the property was never conveyed by way of completion of the bargain, and Cohen died. Thereafter, company A proceeded to agree to transfer the property to company B, which was indubitably an associated company within the meaning of the sections we are debating. The completion of the whole matter took the form of a conveyance by Cohen's executors, company A joining in as beneficial owner in order to convey or transfer their outstanding beneficial interest, to company B. It was contended that the transaction was excluded from duty because it could not be said in that case, inter alia—there were other arguments—that a beneficial interest in the property had been previously conveyed to company A; and the basis of that argument, as appears from Mr. Pennycuick's contentions as reported in the case, was that there was no conveyance or transfer thereof, properly so called; there was merely an agreement. As I have earlier observed, an agreement, an agreement or contract, a memorandum of agreement, etc. —these are separate headings from conveyance or transfer in the schedule to the Act of 1891.

I find, then, at the end of Mr. Pennycuick's reported submission,[6] "As to section 50 (1) of the Act of 1938, the words "'conveyed or transferred' should not here be given a different "meaning from that which they bear in the whole of the stamp "duty legislation. They should be given their literal meaning "and not an extended meaning. The words 'directly or

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[5] [1958] A.C. 549; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406, H.L.

[6] [1958] A.C. 549, 555.

" ' indirectly ' do not widen the meaning of the words ' conveyed " ' or transferred.' They merely indicate that a conveyance or " transfer is within the section if it is either directly or indirectly " the act of such a person as is therein mentioned."

The argument on the other side was that although there was that agreement, nevertheless there had been a conveyance or transfer of the beneficial interest in the property by virtue of the contract made by Cohen, and the issue to Cohen of the share consideration. Viscount Simonds said[7]: "It was, however, " urged that the section did not apply inasmuch as the beneficial " interests in question were not previously conveyed or transferred " directly or indirectly by a stranger. I lay no stress on the " words ' directly or indirectly ' but I cannot avoid the conclusion " that, when Cohen entered into the 1950 contract and received " the consideration therefor, and the beneficial interest in the " property accordingly passed to the old company, it was his act " by which it passed, and it would be too narrow a construction " to say that neverthless it was not conveyed or transferred by " him."

I get, as I say, comfort from that opinion, because it seems to me to support the view that one should not give to the words " conveyed or transferred " in section 50 of the Act of 1938 the narrow construction dependent upon the strict dichotomy between the two classes of instrument, a conveyance or transfer as defined in the schedule on the one hand, and a lease on the other.

The result is that in my judgment both appeals fail.

HARMAN L.J. I concur with the Master of the Rolls in thinking that both appeal and cross-appeal should be disallowed.

The transaction here, which my Lord has described, struck the mind of at least one reader when he first saw it with astonishment and dismay; it seemed so artificial. Familiarity has bred not contempt but, I hope, an understanding of the process which was gone through in the course of the six documents spread over the days of that week. Whether, as Mr. Bathurst hoped, the parties rested the seventh day remains to be seen.

Now, in stamp duty cases it is the substance of the case which has to be looked at; authority for that is to be found in Lopes L.J.'s observations in *Great Western Railway Co.* v.

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[7] [1958] A.C. 549, 560.

Inland Revenue Commissioners.[8] His Lordship says: "It is an "established rule in cases under the Stamp Acts that the "substance of the transaction is alone to be looked at in "determining the question whether an instrument is liable to "stamp duty."

Here, there is no doubt, there must have been an arrangement or agreement between the parties, that is to say Littlewoods and the society, which preceded its working out by counsel. For some reason which I do not appreciate the respondents were most unwilling to disclose what this arrangement was. Counsel must have been instructed to bring about the result or he could not have set to work. The method of bringing it about was his invention and the six deeds, or rather the first four of them, were merely machinery ingeniously invented by him for doing that as inexpensively as possible—a perfectly legitimate device.

What, then, in substance was the arrangement? The society had a freehold, saddled with a long lease, having 80 years to run, at a rent which, if it ever had been a rack rent, had long fallen far below it. They were anxious to obtain a rack rent and willing to pay for it by accepting a much shorter term of years, and giving up the freehold reversion. On their side Littlewoods were anxious for their own purposes to obtain the freehold and willing to pay for it in the form of a greatly increased yearly rent for a shorter period. The method adopted brought about the desired result. The question for this court is what stamp duty did the several documents so doing involve.

Controversy, so far as this appeal is concerned, centres round the deed numbered 4, the so-called deed of exchange. By Thursday morning, December 11, the position was that Fork, Littlewoods' wholly-owned subsidiary, held the property as lessee of the society for a term of 22 years 10 days at a nominal rent, and had created an underlease in favour of Littlewoods for a term of 20 years, at a rent of £42,000 odd. The original 99 years lease had vanished by operation of law on the Monday.

By Thursday's document Fork assigned the lease to the society with the benefit of the underlease, and in return the society transferred the freehold reversion to Fork. This is said by the Crown to be a conveyance on sale by the society. Certainly it does not look like one. A sale, prima facie, is a transfer for money. For that purpose I quote Benjamin on Sale, 8th ed. (1950), p. 2, of which one of the editors is Finnemore J. The sidenote is this: "Bargain and Sale defined: By the common "law a *sale* of personal property was usually termed a 'bargain "'and sale of goods.' It may be defined to be a transfer of the "*absolute* or *general* property in a thing for a price in *money*. "Hence it follows that, to constitute a valid sale, there must be "a concurrence of the following elements, viz.:—(1) Parties "competent to contract; (2) mutual assent; (3) a thing, the "absolute or general property in which is transferred from the "seller to the buyer; and (4) a price in money paid or promised."

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[8] [1894] 1 Q.B. 507, 513, C.A.

For Stamp Act purposes this meaning is no doubt extended in three respects, namely, by section 6, to foreign currencies which are a commodity in this country; section 55, which deals with stock or securities, and by section 57 in the case where the consideration is the forgiveness of a debt. But none of these is applicable here. I accept the argument that the proper meaning of the word ought not to be extended further without some very cogent reason. This document is, in a popular sense of that word, an exchange. There is much to be said for the view that it does not come within the meaning of that expression in the schedule to the Act of 1891, but it is not necessary to decide that point. All we need to decide is that it is not a conveyance on sale within the definition in section 54 of the Act and in the schedule.

Again, the Crown calculated the amount of duty on the wording of section 56 (2) of the Act, which of course depends on the document being a conveyance on sale, but it does produce what is admittedly an amount very far in excess of the true consideration, when one considers the transaction as a whole. Littlewoods had at an earlier stage, on the Monday, given up a leasehold term (the original 99 years lease) of which the rent was about half the rack rent. The Crown would have us treat the document as a sale of the freehold for 22 yearly instalments of purchase-money. Neither party contemplated any such thing, nor does the machinery carry out the arrangement in that way. In my judgment this was not a conveyance on sale.

The cross-appeal raises a separate point. By Tuesday's deed Littlewoods assigned the lease created in their favour on Monday to Fork without consideration. This deed would, if executed between 1910 and 1930, attract voluntary disposition duty created by section 74 of the Finance (1909–10) Act, 1910, the duty being equal to that on a conveyance on sale. The value was agreed at £400,000, and the duty, therefore, £8,000. This duty was abolished by the Finance Act, 1930, in cases of transfers

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between associated companies. This exemption was, however, abused and was by the Finance Act, 1938, withdrawn in cases where someone outside the ring had supplied the subject-matter.

This society was an outsider, and had by Monday's lease done that very thing, so that at first sight the exemption would not seem to apply. Littlewoods, however, take the point that section 50 of the Act of 1938 only applies where there has been a conveyance by the other side, and that this word does not apply to the creation of a lease. If this be so, it is a casus omissus from the Act, for Parliament cannot have intended this section to be avoided by so simple an expedient as the creation of a long term of years instead of an assurance of the freehold.

The judge decided that a lease is a conveyance within the meaning of the section, and in my judgment he is right. It was conceded that in ordinary parlance a lease is a conveyance, and that this is also true in general in legal parlance. I feel no doubt that this concession was inevitable. Blackstone, for instance, has the passage cited by my Lord, 21st ed., at p. 273, and the definitions in the Conveyancing Act, 1881, and Law of Property Act, 1925, confirm it.

It was, however, argued that in matters connected with the Stamp Acts this is not so, and I confess that the argument is attractive. In the Act of 1891 and its schedule "lease" and "conveyance" are carefully distinguished, and it was said that the success of the Crown's claim would mean that notwithstanding this, every lease would be stampable with conveyance duty. The Act of 1930 is to be read with the Act of 1891, and though this is not true of the Act of 1938, section 50 is dealing with matter in pari materia, and words in it ought, therefore, so runs the argument, to be construed in the same way. This has the authority of Lord Mansfield [in *Rex* v. *Luxdale* [9]], quoted in *Goldsmiths' Co.* v. *Wyatt*. In his judgment in that case Farwell L.J. cites this [10]: "Lord Mansfield says where there are different statutes "in pari materia, although made at different times or even "expired and not referring to each other, they shall be taken "and construed together as one system and as explanatory of "each other."

Nevertheless, this must not be carried too far, and a reminder of that was given by Lord Simonds in his speech in *Fendoch Investment Trust Co.* v. *Inland Revenue Commissioners*.[11] That was, it is true, an income tax case, but the words I think are general. Lord Simonds said[12]: "My Lords, I do not doubt that, "in construing the latest of a series of Acts dealing with the "specific subject-matter, particularly where all such Acts are to "be read as one, great weight should be attached to any scheme "which can be seen in clear outline, and amendments in later "Acts should, if possible, be construed consistently with that "scheme. But this is a principle which can easily be pressed too "far in the consideration of a body of legislation such as that now "under review. . . ."

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[9] (1758) 1 Burr. 445, 448.

[10] [1907] 1 K.B. 95, 105, C.A.

[11] (1943–45) 27 T.C. 53; [1945] 2 All E.R. 140, H.L.

Therefore, one must, I think, take the principle with a pinch of salt when a long series of Acts of this sort is being dealt with. In my judgment the word "conveyance" here used in section 50 of the Act of 1938 ought to be given its ordinary meaning. It seems to me that this is necessary in order to give its proper effect to the object of the statute, which was only to allow the exemption to continue where no outsider had a finger in the pie. I would, therefore, dismiss the cross-appeal.

Donovan L.J. I agree with both judgments, and have only two observations to add. Whether a document is a conveyance on sale or not raises a question of fact as well as law, namely, is property being transferred to or vested in a purchaser on the occasion of a sale?

The commissioners' legitimate request for full information as to the genesis of these transactions therefore involved no departure from the rule that documents are stamped, and not transactions. I think the solicitors here concerned were unnecessarily coy when pressed to say how the whole thing began. If the parties started with the idea of a sale, and then dropped it in favour of some different scheme involving less stamp duty, there was no reason why they should not say so.

As to the appeal of Littlewoods, while it is true that, for the purposes of stamping, conveyances are distinguished from leases in the Stamp Act, it does not follow that this distinction, unless expressly excluded, must be read into all future legislation upon stamp duty. Harman L.J. has referred to the cautionary observations of Lord Simonds on a cognate point in *Fendoch Investment Trust Co.* v. *Inland Revenue Commissioners*.[13] Parliament, in section 50 of the Finance Act, 1938, had the clear object of withholding exemption where, pursuant to some arrangement, the

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[12] 27 T.C. 53, 68.

[13] 27 T.C. 53.

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property came from a source outside the associated companies. As I view the matter, the court should endeavour to give effect to that intention unless the language of the section is too recalcitrant for the purpose. So far from that being the situation, the language is wholly apt to cover the present case, unless the segregation of leases from conveyances in the Act of 1891 is to be imported into the Act of 1938. For this I see no reason, and, therefore, no justification.

Appeal and cross-appeal dismissed.
No order as to costs. Leave to appeal to House of Lords granted.

Solicitors: *Jaques & Co.* (*for North, Kirk & Co., Liverpool*); *Solicitor of Inland Revenue.*

E. D.

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April 27, 28;
May 1.

Holroyd Pearce, Upjohn and Donovan L.JJ.

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ELLWOOD (INSPECTOR OF TAXES) *v.* CENLON FINANCE CO. LTD.

TABLEAU HOLDINGS LTD. *v.* WILLIAMS (INSPECTOR OF TAXES).

WILLIAMS (INSPECTOR OF TAXES) *v.* TABLEAU HOLDINGS LTD.

Revenue—Income tax—Profits of trade—Dividends—Exclusion—Capital profits dividend—Dealer in stocks and shares—Whether dividend taxable as profits.

Revenue — Income tax — Assessment — Agreement of computation by inspector—Subsequent additional assessments—Whether a "discovery" by inspector—Whether inspector precluded by agreement from making additional assessments—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *ss.* 41 (1), 50 (2), 510.

On November 18, 1952, T. Co. started trading as a financier. On the same date it bought the whole of the share capital in H.W. Co., a company resident in the United Kingdom for £87,909 17s. Later the same day H.W. Co. paid to T. Co. a dividend of £18,000 out of a capital profit which it had made on the sale of freehold land and which was not, therefore, liable to tax in the hands of H.W. Co. under section 184 of the Income Tax Act, 1952. On October 20, 1953,

T. Co. sold the whole of its shares in H.W. Co. to C. Co., which had started trading as a dealer in stocks and shares four days earlier, for £72,000. On November 2, 1953, H.W. Co. paid a dividend of £25,000 to C. Co. out of the original capital profit. On December 4, 1953, C. Co. sold its holding of shares in H.W. Co. for £27,500. Both T. Co. and C. Co. submitted that the capital distributions made by H.W. Co. did not have to be brought into account when computing their profits under Case I of Schedule D to the Income Tax Act, 1952, with which the inspectors of taxes ultimately agreed. Subsequently, the inspectors, on a reconsideration of the existing facts, decided that the dividends should be brought into account in computing the companies' profits and raised additional assessments. Cross J. held, (1) that the dividends were properly left out of the computation of the companies' liability to tax, and (2) that the inspectors of taxes, having come to agreements with the taxpayers on a particular point at issue, were precluded by sections 510 and 50 (2)[1] from raising additional assessments in relation to that issue. On appeal:—

Held, (1) that, although the dividend was not taxable in the hands of H.W. Co. under section 184 of the Income Tax Act, 1952, this was not conclusive of the present case; and that, applying general tax principles, a company trading in stocks and shares had to bring in as part of the profits of its trade for assessment to tax a capital distribution by way of dividend by a United Kingdom company in the same way as such a company had to bring in profits made by it in dealings, which, in the hands of a non-trader, would be capital profits.

Bradbury v. *English Sewing Cotton Co. Ltd.* [1923] A.C. 744; 39 T.L.R. 590; 8 T.C. 481, H.L.; *Neumann* v. *Inland Revenue Commissioners* [1934] A.C. 215; 50 T.L.R. 246; 18 T.C. 332, H.L.; *Canadian Eagle Oil Co. Ltd.* v. *The King* and *Selection Trust Ltd.*

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[1] Income Tax Act, 1952, s. 41: "(1) If the surveyor discovers—that "any properties or profits chargeable "to tax have been omitted from the "first assessments; . . . (ii) where "the tax is chargeable under "Schedule D, the additional com"missioners shall make an assess"ment on the person chargeable, in "an additional first assessment, in "such a sum as, according to their "judgment, ought to be charged . . ."

S. 50 (2): "An appeal, once "determined by the commissioners, "shall be final, and neither the deter"mination of the commissioners, nor "the assessment made thereon, shall "be altered, except by order of the "court when a case has been required "as provided by this Act."

S. 510: "(1) Subject to the pro"visions of this section, where a per"son gives notice of appeal to the "general commissioners, the special "commissioners or the Board of "Referees against an assessment "to . . . income tax . . . and, before "the appeal is determined by the "commissioners or board, the sur"veyor . . . and the appellant come "to an agreement, . . . that the "assessment . . . should be treated "as upheld without variation, or as "varied in a particular manner or as "discharged or cancelled, the like "consequences shall ensue for all pur"poses as would have ensued if, at "the time when the agreement was "come to, the commissioners or "board had determined the appeal "and had upheld the assessment . . . "without variation, had varied it in "that manner or had discharged or "cancelled it, as the case may be."

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v. *Devitt* [1946] A.C. 119; 61 T.L.R. 577; [1945] 2 All E.R. 499; 27 T.C. 206, H.L. considered.

Hughes v. *Bank of New Zealand* [1938] A.C. 366; 54 T.L.R. 542; [1938] 1 All E.R. 778; 21 T.C. 472, H.L. distinguished.

(2) That since, by section 510, the agreement which the inspector had come to with the taxpayer was to be treated as if it had been the determination of an appeal, and, by section 50 (2), an appeal was final, the matter could not be relitigated by the Crown under the guise of an additional assessment under section 41, and, accordingly, in so far as the dividend was taxed by means of an additional assessment after agreement, the additional assessment was invalid.

Decision of Cross J. [1961] Ch. 50; [1960] 3 W.L.R. 690; [1960] 3 All E.R. 390 reversed in part.

APPEAL from Cross J.[2]

Two companies, Tableau Holdings Ltd. and Cenlon Finance Co. Ltd., both trading as dealers in stocks and shares, on being assessed for tax under Case I of Schedule D of the Income Tax Act, 1952, had included in their assessments for tax dividends paid to them from the capital profits of a company in which they held all the shares.

The following facts were found by the special commissioners in *Tableau Holdings Ltd.* v. *J. H. Williams (Inspector of Taxes)*: Tableau Holdings Ltd. carried on business as a financier and was assessed to income tax under Case I of Schedule D on any profits arising from such trade. Henry White (Sutherland House) Ltd. (called "Henry White") was a company resident in the United Kingdom carrying on business as ladies' outfitters. It had sold some of its freehold property at High Street and at Ironmarket, Newcastle-under-Lyme, and realised thereby a profit which was capital profit and had not been assessed to tax in its hands. Tableau Holdings Ltd. began trading on November 18, 1952, and on the same date acquired for £87,909 17s. the whole of the share capital of Henry White consisting of 20,000 ordinary shares of £1 each. Later the same day Henry White paid to Tableau Holdings Ltd., its shareholder, a distribution of £18,000 out of such capital profit pursuant to the following special resolution of the shareholders: "That the sum of £18,000 surplus "moneys in the hands of the company representing part of the "capital profit arising from the sale of the company's property "at Ironmarket and being an accretion to capital be distributed "amongst the present holders of the shares in the capital of the "company pari passu and in proportion to the number of such

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[2] [1961] Ch. 50; [1960] 3 W.L.R. 690; [1960] 3 All E.R. 390.

"shares respectively held by them and on the footing that they "become entitled thereto as capital and the directors are hereby "authorised and directed to distribute the same accordingly."

On October 20, 1953, Tableau Holdings Ltd. sold the whole of the shares in Henry White to Cenlon Finance Co. Ltd. for £72,000. Under the general heading of trading profit in its profit and loss account from November 18, 1952, to April 17, 1954, Tableau Holdings Ltd. brought the £18,000 to credit as a distribution of capital profit. The profit and loss account for the period was also credited with a profit of £1,055 described as profit on dealings.

On November 11, 1954, the inspector wrote to the company's accountants as follows: "What are the name and address of the "company from whom the capital distribution of £18,000 was "received and what briefly are the extent and history of Tableau "Holdings' interest in that company?" to which the accountant replied on November 12: "Henry White (Sutherland House) "Ltd. . . . the entire issued share capital of which the company "purchased in November, 1952, and sold in October, 1953." On November 24, 1954, the inspector of taxes issued notices of assessment for income tax under Case I of Schedule D on the company for the years 1952–53, 1953–54 and 1954–55 on the basis that the £18,000 was part of its taxable profit. Notice of appeal against all those assessments was given on the company's behalf on November 26, the grounds stated being that the company's assessments should be in the amounts shown in computations sent to the inspector of taxes, and on December 9, 1954, the inspector of taxes interviewed the solicitors and the accountants acting for the company when the subject-matter of the dispute was argued. On December 14, 1954, the inspector of taxes wrote to the company's accountants as follows: "I have considered the argu-"ment you put to me at our interview on December 9, 1954, "and I am persuaded that the 'capital' dividend of £18,000 is "properly deductible in computing the profits assessable under "Case I of Schedule D. I accordingly agree that the assessments "for 1952–53, 1953–54, and 1954–55 be reduced to £185, £475 "and £475 respectively and am having the amendments made." The assessments were duly amended by the inspector of taxes in accordance with his letter and the income tax payable in respect of such amended assessments had been duly paid. On December 18, 1954, the inspector of taxes wrote to the company's accountants confirming that the profit assessable to income tax for 1955–56 was agreed at £475. On July 27, 1956, the inspector of taxes wrote to the company's accountants as follows: "As you "are aware my head office has considered the question of distri"butions received by an investment dealing company from a "company which has not deducted tax on the ground that the "receipt was of a capital nature in its own hands. It is considered "that the £18,000 received by Tableau Holdings Ltd. in the "period ended 17.4.54 is assessable Case I, and accordingly I "propose submitting additional assessments." The assessments appealed against were then made.

It was contended on behalf of the company (1) the dividend of £18,000 was admittedly income but, having been received from a company resident in the United Kingdom, it could only have been taxed if paid out of profits and gains brought into charge to tax and the paying company had deducted tax; that as it was paid out of a capital profit, no such deduction was permissible and the dividend rightly remained untaxed: The company, as a shareholder could not in any event be taxed in respect of the dividend under Schedule D by treating it as a trading receipt; (2) the additional assessments for the years 1952–53, 1953–54 and 1954–55 were incompetent by reason of the fact that appeals against first assessments for those years, raising the same issue, had been settled by agreement under the provisions of section 510 (1) of the Income Tax Act, 1952: The provisions of that subsection and section 50 (2) rendered any additional assessments under section 41 for those years completely incompetent and consequentially invalid; (3) in view of the Court of Appeal's decision in *Commercial Structures Ltd.* v. *Briggs* [3] it could not be contested before the commissioners that there was no discovery within the meaning of section 41 to justify the making of the additional assessments for 1952–53, 1953–54, 1954–55 and 1955–56, but that point would, however, be reserved on the company's behalf in the event of further appeals.

It was contended on behalf of the Crown: (1) that the sum of £18,000 was a trading receipt of the company and as such had to be taken into account in computing the amount of the company's profits or gains for the purposes of Case I of Schedule D, and there was nothing in the Income Tax Acts to prevent its inclusion; (2) the inspector had discovered that the company had been undercharged in the first assessments for each of the years 1952–53 to 1955–56 inclusive, within the meaning of section 41 of the Act of 1952; (3) in consequence of that discovery, all the additional assessments under appeal were validly made under section 41; and the additional assessments for the years 1952–53 to 1954–55 inclusive were not barred by reason of the settling of the appeals against the first assessments for those years under section 510 or by reason of the provisions of section 50 (2), or by reason of the issue having been already determined.

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[3] [1948] 2 All E.R. 1041; 30 T.C. 487, C.A.

The commissioners held that: (1) the £18,000 in question was a trading receipt and liable to be included in the computation of the company's profits for the purposes of income tax, but (2) that the additional assessments for the years 1952–53 to 1954–55 inclusive were incompetent inasmuch as the issues raised therein had already been determined on appeals against first assessments for those years by agreement between the parties under the provisions of section 510 (1), the appeals having become final and conclusive by reason of section 50 (2). They accordingly discharged the additional assessments for those years; (3) for 1955–56 there was a discovery by the inspector of taxes within the meaning of section 41 and they, accordingly, confirmed the additional assessment for 1955–56 in the sum of £12,705.

The appeals in *Cenlon Finance Co. Ltd.* v. *Ellwood* raised the same point. The case stated is fully set out in the report of the proceedings before Cross J.[4] Cross J. held, (1) that the dividends were properly left out of the computations of the companies' liability to tax, and (2) that the inspectors of taxes, having come to agreements with the taxpayers on a particular point at issue, were precluded by sections 510 and 50 (2) from raising additional assessments in relation to that issue.

The Crown appealed.

Roy Borneman Q.C. and *Alan S. Orr* for the Crown.

Philip Shelbourne and *J. Holroyd Pearce* for the taxpayers, Tableau Holdings Ltd. and Cenlon Finance Co. Ltd.

The arguments presented to the Court of Appeal were substantially the same as those before Cross J.[5]

The following cases, in addition to those referred to in the judgments, were cited in argument: *Liverpool and London and Globe Insurance Co.* v. *Bennett*[6]; *Inland Revenue Commissioners*

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[4] [1961] Ch. 50.

[5] Ibid. 56–64.

[6] [1913] A.C. 610; 29 T.L.R. 757; 6 T.C. 327, H.L.

v. *Brooks* [7]; *Gimson* v. *Inland Revenue Commissioners* [8]; *Cull* v. *Inland Revenue Commissioners.*[9] *Californian Copper Syndicate Ltd.* v. *Harris*,[10] also cited in argument, was not cited to Cross J.

UPJOHN L.J. These are two appeals from judgments of Cross J. Both appeals raise exactly the same points, and the facts are fully set out in the cases stated; but, as they are so short and some of the facts are common to both cases, I propose to restate them at the beginning of this judgment.

In the first case, Tableau Holdings Ltd. was incorporated in November, 1952, as a finance company—that is to say, a company which trades in stocks and shares. In the same month, Tableau Holdings acquired the whole of the issued capital of a company known as Henry White (Sutherland House) Ltd., which carried on business as ladies' outfitters. That company had sold some of its freehold property at Newcastle-under-Lyme, and thereby realised a profit which was a capital profit and had not been assessed to tax in its hands. The purchase consideration for the acquisition of its shares was the sum of £87,909; and, on the same day, Henry White distributed by way of dividend to Tableau Holdings, as its sole shareholder, a sum of £18,000 out of the capital profit on the sale of its premises. Being a capital profit not subject to tax, no tax was deducted by Henry White when making the distribution.

Nearly a year later, on October 20, 1953, Tableau Holdings sold the whole of the issued share capital in Henry White to Cenlon Finance Co. Ltd. for the sum of £72,000. The operation was repeated, and, on November 2, 1953, Henry White made another capital distribution by way of dividend out of the profit on the sale of its premises to Cenlon of £25,000, again without deduction of tax. On December 4, 1953, Cenlon sold its entire holding of shares in Henry White for £27,500. Cenlon, like Tableau Holdings, was incorporated to carry on a business as a finance company, or dealer in stocks and shares.

In these circumstances, it is not in doubt that each company is assessable under Case I of Schedule D to the Income Tax Act, 1952, for the profits that it makes on transactions in investments and securities, and is entitled to deduct losses made in the course of such transactions. Thus it is not in dispute that each of the companies was entitled to bring into the computation of its total profits for the year the loss which it made on the sale of the shareholding in Henry White. The sole question is whether the dividends declared by Henry White and paid to Tableau Holdings and Cenlon respectively ought to be brought in as a credit in assessing the profits of the respective companies' trade. That is the first and principal point raised in the appeal.

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[7] [1915] A.C. 478; 31 T.L.R. 89; 7 T.C. 236. H.L.

[8] [1930] 2 K.B. 246; 15 T.C. 595.

[9] [1940] A.C. 51; 55 T.L.R. 1049; [1939] 3 All E.R. 761; 22 T.C. 603, H.L.

[10] (1905) 5 T.C. 159 (Sc.).

But there is a subsidiary point which arises in this way. In the case of each company, in respect of some of the relevant years of assessment, it was submitted to the appropriate inspector of taxes that the capital distribution made by Henry White ought not to be brought into account in assessing the profits of the company under Case I of Schedule D. In each case the inspector ultimately accepted the submission and agreed that these dividends should be omitted from the computation of the trading profit. Later, each inspector changed his mind and raised an additional assessment on each of the companies, claiming that these distributions should be brought into account as a profit for the purposes of Case I of Schedule D. It is admitted that in each case no new facts had come to light, and the inspectors respectively raised the additional assessment upon each company on a further consideration of the matter, when they respectively came to the conclusion that, in law, each of the companies was liable to bring these sums as distributed into account in the computation of their profits. The question then arises as to whether the inspectors respectively, having agreed to the original assessment, are entitled to raise an additional assessment under section 41 of the Income Tax Act, 1952, in respect of those relevant years of assessment in which the agreement had been made.

I turn, then, to the first and main point—that is to say, whether a company incorporated to transact dealings in stocks and shares is bound to bring into the computation of its profits under Case I of Schedule D dividends it has received from which tax is not deductible by the paying company under section 184 of the Income Tax Act, 1952. I must, of course, deal with the argument on behalf of the taxpayer in some detail, but I may perhaps usefully state the argument in a nutshell at this stage, and it is this: counsel on behalf of the taxpayer submits that the Income Tax Act, 1952, like its predecessors, contains no provision for taxing dividends except as provided by section 184. That section, he submits, contains a code for taxing dividends, and if, under its provisions, tax is not deductible from a dividend, then, in the hands of the recipient, that dividend escapes tax altogether and, in truth, dividends from which tax is not deductible under section 184 are in fact exempt from all tax. Let me state at once that this judgment has reference only to dividends declared by companies resident in the United Kingdom: quite different considerations apply to companies resident abroad. Nor am I concerned with surtax.

I must begin by reading section 184: "(1) The profits or gains "to be charged on any body of persons shall be computed in "accordance with the provisions of this Act on the full amount "of the same before any dividend thereof is made in respect of "any share, right or title thereto, and the body of persons paying "the dividend shall be entitled to deduct tax at the standard rate "for the year in which the amount payable becomes due. (2) Sub-"section (1) of this section shall, in relation to a dividend paid "by any body of persons, be construed as authorising the deduc-"tion of tax from the full amount paid out of profits and gains "of the said body which have been charged to tax or which, "under the provisions of this Act, would fall to be included in "computing the liability of the said body to assessment to tax "for any year if the said provisions required the computation to "be made by reference to the profits and gains of that year and "not by reference to those of any other year or period."

The ancestor of this section was section 54 of the Income Tax Act, 1842. That section has been the subject of judicial comment, and both counsel for the taxpayer and counsel for the Crown rely on the passage contained in the speech of Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co. Ltd.*,[1] where he said: "This case seems to depend upon the following considerations: "A joint stock company is under the Income Tax Act, 1842, "treated as a person and is directed to make a return of its "profits or gains according to Schedule D upon a conventional "figure, arrived at by taking an average of the three preceding "years, and is liable to be assessed and taxed thereupon. If the "principle of its being a distinct person, distinct from its share-"holders or the aggregate of its shareholders, had been carried "to a logical conclusion, there would have been no reason why "each shareholder should not, in his turn, have to return as part "of his profits or gains under Schedule D, the money received "by him in dividends. Their taxation would seem to be logical, "but it would be destructive of joint stock company enterprise,

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[1] [1923] A.C. 744, 769; 39 T.L.R. 590; 8 T.C. 481, H.L.

"so the Act of 1842 has, apparently, proceeded on the idea that "for revenue purposes a joint stock company should be treated "as a large partnership, so that the payment of income tax by a "company would discharge the quasi-partners. The reason for "their discharge may be the avoidance of double taxation, or to "speak accurately, the avoidance of increased taxation. But the "law is not founded upon the introduction of some equitable principle as modifying the statute; it is founded upon the provisions "of the statute itself; and the statute carries the analogy of a "partnership further, for it contemplates a company declaring a "dividend on the gross gains, and then on the face of the dividend "warrant making a proportionate deduction in respect of the "duty, so that the shareholder whose total income is so small "that he is exempt from income tax or pays at a lower rate, "can get the income tax which has been deducted on the dividend "warrant returned to him."

Lord Phillimore continued[2]: "A company either comes under "section 40 of the Act of 1842, or it does not. If it does not, it "is not taxable; but in that event those who receive dividends "from it will be taxable in respect of their dividends. If it does "come under section 40, its shareholders are not taxable for "their dividends. This is so, not because of any implied rule of "law against double taxation, a rule for which it would be difficult to find support in the books, but because dividends on "shares in a taxed company do not come under Schedule D." The reference by Lord Phillimore to "quasi-partners" is readily understood by reading section 54 and section 40 of the Income Tax Act, 1842.

Mr. Shelbourne, for the taxpayer, in an attractive and forceful argument, submits that on the true construction of the Income Tax Acts, and especially having regard to the wide wording of Case VI of Schedule D, it would have been open to the court to hold that dividends in the hands of the recipient shareholders would freshly be liable to tax in their hands under Case VI, but, as he submits, Lord Phillimore pointed out that had that been done that would have put an end to joint stock company trading overnight. I entirely agree with that submission. Therefore, he submits, and rightly, that there is no provision in the Income Tax Acts which provides for the taxation of dividends declared by companies save as is provided by section 184—that is to say, that if a company is paying dividends out of profits which have been

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[2] [1923] A.C. 744, 771.

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brought into charge for tax, they are entitled (though not bound) to deduct tax from the dividend. He further points out that this result is reached, not by any benevolent construction of the law against double taxation, but, to use the words of Lord Phillimore,[3] "it is founded upon the provisions of the statute itself." Thus, he submits, dividends are taken altogether out of the taxing provisions of the Income Tax Acts; so that, in effect, the recipient of the dividend can be taxed only if the company paying the dividend is entitled to deduct tax from that dividend under section 184. As a general proposition, with all this I agree, and I do not think that Mr. Borneman, who has argued the case on behalf of the Crown, finds himself in disagreement, either.

The proposition that dividends are not subject to taxation, except by deduction under section 184, has been repeatedly restated in the House of Lords. In *Neumann* v. *Inland Revenue Commissioners*[4] Lord Tomlin said: ". . . I may say at once "that, having regard to the view which I have expressed as to "the general scheme and operation of the Income Tax Acts in "regard to dividends, I am unable to accept the view that divi-"dends as such are taxable under Schedule D." Lord Wright[5]: ". . . I reach the conclusion that a shareholder is not separately "taxable (I disregard surtax) on a dividend, as a profit individual "to himself, under Schedule D, Case VI, as the Court of Appeal "held, or at all." He then went on to cite extracts from earlier cases, including an extract from the passage in Lord Phillimore's speech which I have already read.

In *Canadian Eagle Oil Co. Ltd.* v. *The King*[6] Lord Simonds put it very briefly in this way: "The shareholder in an English "company is not taxed upon his dividend, but he goes untaxed "because on the true construction of the Income Tax Act no tax "is imposed on his dividend. He does not escape tax because "some overriding principle says that he shall not be taxed."

There has been much debate before us as to the meaning of the words in Lord Tomlin's speech,[7] which I have just quoted, "as such." I do not think that they occasion any difficulty. In my judgment, what the House of Lords are saying quite clearly is this, that there is no provision in the Income Tax Acts whereby dividends are brought in as a subject-matter of taxation under any of the schedules. This is in marked contrast (to take but one example) to the recipient of interest from British Government securities. The mere receipt of such interest automatically makes the recipient liable to an assessment under Schedule C, and he is assessed accordingly; but the receipt of a dividend by a subject does not entitle the Crown to raise an assessment on him in respect of that dividend. Accordingly, as is perfectly well settled, if a taxpayer receives a dividend, as in this case, out of profits not brought into charge to tax, the company is not entitled to deduct tax, and that dividend remains tax free in his hands both for the purposes of income tax and surtax. That is the first step in Mr. Shelbourne's argument, and I entirely agree with his submission.

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[3] [1923] A.C. 770.

[4] [1934] A.C. 215, 228; 50 T.L.R. 246; 18 T.C. 332, H.L.

[5] [1934] A.C. 215, 236.

[6] [1946] A.C. 119, 158; 61 T.L.R. 577; [1945] 2 All E.R. 499; 27 T.C. 206, H.L.

[7] *Neumann* v. *Inland Revenue Commissioners* [1934] A.C. 215, 228.

The next step which he takes is this. He submits that in assessing the company to these capital distributions the Crown is in fact taxing a dividend, and they are not entitled to do so because section 184 contains a complete and exhaustive code for the taxation of dividends, and if tax is not deductible under that section then the Crown are not entitled to tax on the dividend in any circumstances. He submits that section 184 is really a head of taxation comparable to the schedules contained in the Act. He submits that it is the duty of the Crown to analyse the profit and loss account submitted for the purposes of Case I of Schedule D to see whether something has been brought in which is not subject to tax.

He points out truly that if in a trading company's accounts you find, for example, rent received from land, you must take it out of Case I, Schedule D, assessment and tax it under Schedule A. No doubt that is perfectly true, and is due to the construction which has been put on the Income Tax Acts in the well-known case of *Fry* v. *Salisbury House Estate Ltd.*[8] The law was there laid down that each schedule contained a definite code applying exclusively to their defined subject-matters (see *per* Lord Atkin [9]). Equally, no doubt, if you find in the trading account interest from Government securities, you must take that out and tax it under Schedule C. So he says, if you find the dividend declared by a company, you must take that out and see whether it is taxable under the provisions of section 184, and, if not so taxable, it escapes the net altogether.

He relies, naturally, on *Hughes* v. *Bank of New Zealand.*[10]

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[8] [1930] A.C. 432; 46 T.L.R. 336, 358, H.L.

[9] [1930] A.C. 432, 457.

[10] [1938] A.C. 366; 54 T.L.R. 542; [1938] 1 All E.R. 778; 21 T.C. 472, H.L.

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In that case, during the First World War, the British Government issued securities which were to be tax free in the hands of non-residents for the reason that they wanted to attract funds with which to fight the war from overseas non-residents. It was held that not only was the interest exempt as such under Schedule C, but that in the case of a non-resident trading company it was not permissible to bring in the interest under Case I of Schedule D, and thereby tax the interest indirectly as a profit of the trade carried on by the respondent bank. The same result was reached in the case of interest where there was exemption not by statute but by virtue of the rules made under the schedules. This result was reached by application of the *Salisbury House* [11] principle; that is, that if a source of income is taxed under one schedule but is exempt by virtue of rules under that schedule, it is altogether exempt and cannot be taxed under another schedule. For another example of the exclusiveness of the schedules relied on by Mr. Shelbourne, see *Thompson* v. *Trust and Loan Company of Canada.*[12] He also pointed out that in *Inland Revenue Commissioners* v. *Reid's Trustees* [13] Lord Simonds pointed out that, though a dividend paid out of capital profits is necessarily income in the hands of the recipient, it will escape taxation unless tax can be deducted under section 184.

These are the main authorities from which he asked us to deduce that section 184 constitutes a complete and exhaustive code, really a charging schedule, which charges dividends to tax, so that they cannot be charged in any circumstances under any other schedule: they are exempt. This was indeed accepted by the judge, who decided this point in his favour when he said [14]: "In my judgment, the exemption of dividends from income "tax which is implied in the deduction provisions of the Income "Tax Act is a general exemption analogous to the express "exemption of War Loan interest in the beneficial ownership "of a non-resident."

Speaking for myself, I am quite unable to accept this argument. Section 184 is not a charging section, and has no analogy with the charging schedules contained in the Income Tax Acts. It is to be found in Part VII of the Act and is a machinery or administrative provision, and is directed solely to the case where a company is paying a dividend out of profits charged to tax, and is authorised (though not compellable) to deduct the tax from the dividend. Speaking for myself, I cannot for one moment accept the submission that section 184 forms a complete and exhaustive code for the taxation of dividends. I see nothing in section 184 corresponding to the legislation in *Hughes* v. *Bank of New Zealand* [15] which exempts dividends from taxation. The matter must be regarded as one of general principle.

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[11] [1930] A.C. 432.

[12] [1932] 1 K.B. 517; 48 T.L.R. 209; 16 T.C. 394, C.A.

[13] [1949] A.C. 361; [1949] 1 All E.R. 354; 30 T.C. 431, H.L.

[14] [1961] Ch. 50, 66; [1960] 3 W.L.R. 690; [1960] 3 All E.R. 390.

In the ordinary case, a company pays dividends out of profits brought into charge for tax, and deducts the tax. No difficulty arises. If a company (as in this case) such as Henry White makes a capital profit, then it is not entitled to deduct the tax under section 184, and there is no provision in the Income Tax Acts whereby the recipient can automatically be assessed to tax on the dividend. Those are the ordinary cases; but this is a case where the company assessed is a trader in stocks and shares. I can see nothing myself to prevent the application of the ordinary rules; that is to say, the company is assessed under Case I of Schedule D on the profit made from dealing in stocks and shares, and it has to bring in profits that it makes on dealings which in the hands of a non-trader would be capital profits: for example, the profit made on the sale of a share over the purchase price; a cash repayment on a reduction of capital; dividends received in a liquidation—all these would be capital profits in the hands of the non-trader. But the trader has chosen to regard his stocks and shares as his stock-in-trade, and he deals with them as such; and the fruit which is yielded by such dealings is the fruit of his trade, and is assessable to tax under Case I of Schedule D.

I can see no distinction between the cases I have mentioned and the case of a capital distribution by way of dividend by a company as a going concern. It is all part of the fruit of his stock-in-trade; and, on general income tax principles, it must be brought in to his computation as part of the revenue profits of his trade. Short of some express exemption exempting dividends from taxation altogether, I cannot see how it is possible to exclude dividends, although tax may not be deducted under section 184, from computation when ascertaining the trader's profits. There most certainly is no express exemption in section 184, and I cannot see how any exemption is to be implied from the words of the section.

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[15] [1938] A.C. 366.

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It seems to me clear that the House of Lords in the cases I have mentioned were stating a general proposition in relation to the receipt by a shareholder of a dividend, and that they did not have under consideration the special case of the recipient shareholder being a trader in stocks and shares. Indeed the use by Lord Tomlin of the phrase " as such " (to which I have adverted earlier) makes that very plain. It is perfectly true that in *Selection Trust Ltd.* v. *Devitt,*[16] reported with *Canadian Eagle Oil Co. Ltd.* v. *The King,*[16] the Selection Trust Co. was a dealer in stocks and shares. It is possible that the case might have been argued on a rather broader basis, and have raised the point that is now before us, but in fact the contentions of the Crown were directed to the overthrow of *Gilbertson* v. *Fergusson,*[17] which has stood for 50 years; and I cannot myself draw any assistance from that case for present purposes.

For these reasons, I find myself unable to agree with the judgment of Cross J. In my judgment, the commissioners in each case came to a correct conclusion, and these tax-free dividends ought to be included in the computation of the company's profits for the purposes of Case I, Schedule D, in the year in which they arose.

That makes it necessary to consider the second point, and it is necessary to refer first of all to the relevant sections of the Income Tax Act, 1952. I start with section 50 (2): " An appeal, once " determined by the commissioners, shall be final, and neither " the determination of the commissioners, nor the assessment " made thereon, shall be altered, except by order of the court " when a case has been required as provided by this Act."

The next relevant section is section 510, which was originally introduced as section 51 of the Finance Act, 1949: " (1) Subject " to the provisions of this section, where a person gives notice of " appeal to the general commissioners, the special commissioners " or the Board of Referees against an assessment to, or a decision " of any kind with respect to, income tax other than surtax or " surtax, and, before the appeal is determined by the commis- " sioners or board, the surveyor or other proper officer of the " Crown and the appellant come to an agreement, whether in " writing or otherwise, that the assessment or decision should be " treated as upheld without variation, or as varied in a particular " manner or as discharged or cancelled, the like consequences shall

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[16] [1946] A.C. 119.

[17] (1881) 7 Q.B.D. 562; 1 T.C. 501, C.A.

" ensue for all purposes as would have ensued if, at the time " when the agreement was come to, the commissioners or board " had determined the appeal and had upheld the assessment or " decision without variation, had varied it in that manner or had " discharged or cancelled it, as the case may be. (2) Subsection (1) " of this section shall not apply where, within 21 days from the " date when the agreement was come to, the appellant gives " notice in writing to the surveyor or other proper officer of " the Crown that he desires to repudiate or resile from the " agreement."

It is not in doubt that the effect of section 510 is that if the inspector comes to an agreement with the taxpayer, the effect of such an agreement is the same as if the point at issue between the inspector and the taxpayer had been determined on appeal by the commissioners. In this case, it is conceded by the Crown that in each case the inspectors did come to such an agreement with the company concerned to the effect that for certain years of assessment these tax-free dividends were to be excluded from the assessments in question. The question, therefore, may be posed very shortly: Is the Crown entitled to raise an additional assessment under the provisions of section 41, notwithstanding either an agreement or an appeal which has been determined by the commissioners?

Section 41 (1) is in these terms: " If the surveyor discovers— " that any properties or profits chargeable to tax have been " omitted from the first assessments; or that a person chargeable " has not delivered any statement, or has not delivered a full and " proper statement, or has not been assessed to tax, or has been " undercharged in the first assessments; or that a person chargeable has been allowed, or has obtained from and in the first " assessments, any allowance, deduction, exemption, abatement " or relief not authorised by this Act, then and in every such " case "—and I turn to sub-paragraph (ii): " where the tax is " chargeable under Schedule D, the additional commissioners " shall make an assessment on the person chargeable, in an " additional first assessment, in such a sum as, according to their " judgment, ought to be charged, and any such assessment shall " be subject to appeal."

Before us, Mr. Shelbourne has properly conceded that we are bound by *Commercial Structures Ltd.* v. *Briggs*,[18] so that, subject always to the point on section 50 (2), the inspector is entitled to raise an additional assessment on the taxpayer merely because he has a change of mind as to the law applicable to the circumstances of the case, although no new fact or other event has subsequently emerged which would cause him to change his mind. Mr. Shelbourne reserves the right to challenge that case if the matter should go higher.

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[18] [1948] 2 All E.R. 1041; 30 T.C. 487, C.A.

The commissioners in each case, and the judge, came to the conclusion that the inspector was not entitled to raise an additional assessment on the taxpayer. I agree with them, and propose, therefore, to state my conclusions very shortly. Mr. Borneman's argument on this matter may be briefly stated. He submitted that no agreement which an inspector may make under section 510, and no determination on an appeal before the commissioners, can prevent the operation of the assessing machinery provided by the Income Tax Acts, and preclude an inspector from raising by a first or additional assessment the imposition of the current liability on the taxpayer. The logical consequence of that submission, subject to the general limitation of six years, is that no agreement by the inspector and no determination of an appeal by the commissioners after a hearing is binding on the Crown.

Mr. Borneman relied on certain dicta of Warrington L.J. in *Gundry* v. *Dunham*,[19] but I must confess that such dicta are quite inconclusive for the purpose now under consideration. He also relied on certain observations of Rowlatt J. in *Anderton and Halstead Ltd.* v. *Birrel.*[20] It is perfectly true that the judge did there express the view that the section in the Income Tax Act, 1918, corresponding to section 50 did not preclude the inspector from raising an additional assessment, but it is quite clear he did so on the ground that, in his view, a mere change of mind as to the applicable law would not give rise to a case for an additional assessment under the section corresponding to section 41. Whether Rowlatt J. would have come to that conclusion on the footing that the law is as stated in the *Commercial Structures* case[21] is a matter of speculation. It follows, therefore, that his observations are not of assistance in this case.

In my judgment, if we were to give effect to the submissions made on behalf of the Crown, we should be rendering section 50 (2) completely nugatory; and, what is equally important, it was quite futile and unnecessary to pass section 510 as section 51 of the Finance Act, 1949: for in essence the Crown would not be bound until the passing of six years, and they could always reopen any assessment on a change of mind as to the law applicable. It seems to me that section 50 (2) is directed to the case where a particular point has been determined, and when that point is determined it cannot be relitigated; both sides are bound. So with section 510, when a particular point has been agreed, the parties are bound subject only to a locus penetentiae given to the subject but not to the Crown under subsection (2). If they are bound, both sides must be bound, and it cannot be open to the Crown, under the guise of an additional assessment under section 41, to relitigate the very point, and in this case the only point, that has been agreed between the parties. On that short ground I would agree with the decision of the judge and of the commissioners.

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[19] (1915) 32 T.L.R. 142; 7 T.C. 12, 24, C.A.

[20] [1932] 1 K.B. 271; 47 T.L.R. 528; 16 T.C. 200.

[21] [1948] 2 All E.R. 1041.

For these reasons, I am of opinion that in each case the commissioners came to a correct conclusion. I would therefore allow the appeal in each case and restore the decisions of the commissioners.

Donovan L.J. In each of these cases the respondent is a company whose trade consists in dealing in investments for profit. In the course of such trade, each company received a dividend on shares which it held, as part of its stock-in-trade in a company which at the time was a subsidiary. The dividend was a distribution of profit which the subsidiary had made by selling certain premises which were part of its fixed capital. Accordingly, in the subsidiary's hands the profit was not liable to income tax. For the same reason, the subsidiary could not deduct income tax at source when paying a dividend out of this capital profit, for section 184 of the Income Tax Act, 1952, does not allow such a deduction in the case of such a dividend. Nevertheless, the dividend was, in the hands of each of the recipient companies, income, and income of its trade. So much is admitted. The profits of each such company are assessable under Case I of Schedule D, and the computation for income tax purposes is to be made " on the full amount of the profits or gains . . ." (section 127 (1) of the same Act).

It is well settled that, for the purposes of Case I of Schedule D, trading profits are to be computed on the principles of commercial accountancy, subject to any express provisions of the Income Tax Acts by which they are excluded or modified (see *Whimster & Co. v. Inland Revenue Commissioners* [22]). No such " exclusions " or modifications are in point here. In consonance with those principles, each of the respondent companies included the dividends here in question in the profit and loss account; but in the special computation of its profits liable to income tax, each company excluded it. The special commissioners who decided the appeal of the Cenlon company and the General Commissioners for the City of London who decided the appeal of the Tableau company both held that the dividend should be included in the computation of taxable trading profits. Cross J. reversed that decision.

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[22] (1926) 12 T.C. 813 (Sc.).

Dividends paid by a company resident in the United Kingdom are not liable to tax as though they were a new income in the hands of the recipient shareholder: I speak throughout, of course, of income tax as distinct from surtax. But under section 184 of the Income Tax Act, 1952, the paying company may, if it chooses, and provided the dividend is paid out of profits charged or chargeable to tax, deduct from the dividend on payment income tax at the current standard rate. If the company does not exercise its option to deduct tax in this way, or if it has no such option because the dividend is paid out of "capital" profits, then the dividend suffers no income tax, albeit that, whether paid out of "income" profits or "capital" profits, it is income in the hands of the recipient shareholder.

So far as they go, these propositions are common ground. They rest on a number of decisions of the House of Lords, beginning with *Bradbury* v. *English Sewing Cotton Co. Ltd.*[23] and continuing to *Canadian Eagle Oil Co. Ltd.* v. *The King*[24] and *Selection Trust Ltd.* v. *Devitt.*[24] But the Crown contends that they do not by themselves solve the problem posed by the present appeals: for what is being taxed here, says the Crown, is the full profit of a trade; and, while a dividend per se is not a taxable subject-matter (save under section 184), nevertheless, when it is a trading receipt as well, the Act requires that it shall be brought in as such when computing the trading profits liable to tax. The respondents reply that this is to tax the dividend indirectly, which is contrary to law. So, although the matter is susceptible of much argument, and many authorities have been canvassed in the course of it, the question in the end is the very narrow one posed by these rival contentions.

I think these two dividends ought to be brought into the computation of trading profits for these reasons: first, the language of the Act itself, which requires the tax to be levied on the full amount of the trading profits, of which these dividends admittedly form part. Secondly, because the provisions of Case I of Schedule D to the foregoing effect are not, in my view, overridden by the provisions of section 184, or by any inference to be drawn from that section. Dividends are not, as such, liable to be assessed to income tax because of anything in section 184, but because the law recognises that while a company is one person and its shareholder is another, nevertheless no new fund of profit is created merely by dividing that fund. But where the dividend comes to a person who is not merely a shareholder but a trader, and the dividend is income of the trade he carries on, why should the Act not be obeyed, and the dividend included in the computation of those profits to be taxed as profits of the trade? It begs the question, if I may say so, simply to say that section 184 is the sole provision for the taxation of dividends.

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[23] [1923] A.C. 744.

[24] [1946] A.C. 119.

Thirdly, I think the decision in *Hughes* v. *Bank of New Zealand*[25] is not applicable here. In that case the special exemption granted by the combined effect of the statute and the Treasury condition was exemption from *all* taxation if the other terms of the condition were complied with (see the observations of Lord Wright M.R.[26]). There is no such special exemption in the case of these dividends; nor, indeed, any exemption properly so called at all. For the term connotes a liability from which someone is excused. The conception does not fit these dividends. Regarded purely as dividends, they were never liable to tax. In this respect, I part company with the judge, who considered that the dividends should not lose their "exemption" by being included in a fund of taxable profits.

These appeals do not raise the problem of the proper treatment of dividends taxed at source received by a company dealing in stocks and shares by way of trade, but in the course of the argument the question has naturally been looked at. These also, in my view, would fall to be included in a computation of profits taxable under Case I of Schedule D, with an adjustment of the tax bill which allows for that suffered at source. There may be no specific provision for such an adjustment, and naturally play was made with that fact by the respondents. But such an adjustment must obviously be made to do justice, and to give effect to the oft-recognised prohibition in the Income Tax Acts against such a double levy of tax, even though it may not be double taxation in the strictly theoretical sense. In this context, of course, I am not considering income of a finance company which

[25] [1938] A.C. 366; 21 T.C. 472, H.L.

[26] [1937] 1 K.B. 419, 429–431; 21 T.C. 472, 491, 492, C.A.

is taxed at source under Schedule C, and which cannot otherwise be taxed because of the rule that income taxable under one schedule may not be taxed instead under another. I do not think the existence of that rule really helps the respondents.

An argument of some subtlety, based on the decision of the House of Lords in *Canadian Eagle Oil Co. Ltd.* v. *The King* [27] and *Selection Trust Ltd.* v. *Devitt*,[27] was addressed to us. It was said that if dividends could be included in a computation of trading profits under Case I of Schedule D, then that provided in the *Selection Trust* case [27] a short and complete answer to the taxpayer there, and one hardly likely to be overlooked by the House of Lords if it were right. Yet quite a different answer was in fact given. But it must be remembered that no argument inviting consideration of the short answer was developed in the House of Lords, although it was mentioned; and while I take notice of what the respondents in these cases now say, I am nevertheless not relieved from the duty of considering the Crown's present arguments on their merits.

As to the contention raised by the respondents on section 510 of the Income Tax Act, 1952, which affords them an alternative defence against the additional assessments, I agree with the views expressed by both bodies of commissioners and by the judge. I add nothing to these, except to say that Mr. Borneman, for the Crown, admitted that his contention involved that the protection which Parliament obviously intended to confer upon the taxpayer by section 510 was wholly illusory.

The point is kept open by the respondents that there has been no "discovery" within the meaning of section 41 of the Act of 1952 so as to justify additional assessments, but merely a change of mind on the same facts for the same year. But this point is concluded by this court's decision in *Commercial Structures Ltd.* v. *Briggs*.[28]

Like Upjohn L.J., I also think that the Crown succeeds in these appeals to the extent that the commissioners' decision in each case should be restored, but that the Crown fails in its contention regarding section 510.

HOLROYD PEARCE L.J. I concur. On the question whether the Crown is precluded by the agreement in writing from raising afresh under section 41 the matter concluded by the agreement, I agree with what the judge and my Lords have said.

[27] [1946] A.C. 119.

[28] 30 T.C. 487.

By section 50 (2), an appeal, once determined, shall be final. There are no words saving the effect of section 41 as to that finality. By section 510, the agreement in writing shares that finality. The finality therefore extends to the particular matter which was the subject of the agreement—namely, in this case, whether the £25,000 and £18,000 dividends could properly be computed in the receipts under Case I of Schedule D. Such a conclusion does not prevent section 41 having a reasonable, though limited, application. Any other conclusion would conflict with the express words in section 50 (2) and would (particularly in view of what section 41 must be taken to mean following *Commercial Structures Ltd.* v. *Briggs* [28]) rob section 50 (2) (and, incidentally, section 510) of its clear intention.

On the other questions also, I agree with what my Lords have said. With all respect to the judge's judgment and to Mr. Shelbourne's able and ingenious argument, I am unable to find any principle that justifies the exclusion of these capital dividends from a computation to which they are otherwise clearly relevant under Case I of Schedule D.

In *Inland Revenue Commissioners* v. *Blott* [29] Lord Cave said: "It"—the company—"pays as a taxpayer, and if no dividend "is declared the shareholders have no direct concern in the pay-"ment. If a dividend is declared, the company is entitled to "deduct from such dividend a proportionate part of the amount "of the tax previously paid by the company; and in that case "the payment by the company operates in relief of the share-"holder." In *Bradbury* v. *English Sewing Cotton Co. Ltd.*,[30] following on that case, Lord Wrenbury said: "The corporator "bore his share of the tax by the deduction of the appropriate "share of the collective tax paid by the corporation from his divi-"dend." Lord Phillimore thus expresses it [31]: ". . . the share-"holder is taken to have paid the tax upon his dividends "through the company and is not assessed or taxed upon them."

That is a perfectly reasonable concept, the company has paid the tax, and the dividend is therefore not brought into receipts under Schedule D to be further taxed. But the concept becomes unreasonable if it is extended to capital dividends which are part of the receipts of a trader. They have not contributed tax at source as dividends on income have done, whether or not that tax is deducted from the dividend. Such capital dividends have

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[28] 30 T.C. 487.

[29] [1921] 2 A.C. 171, 201; 37 T.L.R. 762; 8 T.C. 101, H.L.

[30] [1923] A.C. 744, 766.

[31] Ibid. 771.

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CENLON FINANCE CO. LTD. v. ELLWOOD.

Holroyd Pearce L.J.

not come within section 184 at all, since the section expressly confines itself to "The profits or gains to be charged on any body "of persons" and to "any dividend thereof made in respect of "any share, right or title thereto"—that is, to profits or gains to be charged. There is therefore no reason why the capital dividend, with which qua dividend the Act does not concern itself, should not be taxable if any person receives it as part of the revenue of a taxable trade.

To equate such a capital dividend to the income dividend from which tax has been deducted, or might have been deducted, is misleading. The income dividend is a distribution from, and a part of, a source that has suffered tax. The capital dividend is a distribution from, and a part of, a source which has never been concerned with income tax at all. It becomes for the first time the subject of income tax if it becomes part of a trader's receipts. It has at no time received any exemption or exclusion from deduction of tax, as had the War Loan in *Hughes* v. *Bank of New Zealand*.[32] It is not comparable to the dividends paid in *Thompson* v. *Trust and Loan Company of Canada*,[33] which, having suffered tax by deduction under Schedule C, could not properly be included under Schedule D.

It had no tax character whatever. It had never previously been income, or come within the ambit of income taxation. When first it became income by virtue of a trader receiving it, it could not rely on any exemption or exclusion or any allocation to any other schedule under the Income Tax Acts. One may compare it, for instance, to the proceeds of the sale of a house. Such proceeds have nothing to do with the Income Tax Acts unless and until they are received by a trader who has on the expenses side of his balance-sheet the price at which he bought the house. But in such an event they become part of the revenue of his trade.

The appeals will therefore be to that extent allowed, and the decisions of the commissioners restored.

Appeals allowed on first point, dismissed on second point. No order as to costs in Court of Appeal or below. Leave to appeal to the House of Lords to both parties.

Solicitors: *Solicitor, Inland Revenue; Manches & Co.*

C. J. E.

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[32] [1938] A.C. 366.

[33] [1932] 1 K.B. 517.

END OF VOLUME AND OF CHANCERY SERIES FOR 1961.

SUBJECT-MATTER

AGENCY

Ratification

Competency of principal

Action by local authority for abatement of nuisance—Being "of opinion" of necessity therefor—Resolution accordingly after issue of writ by solicitors—Whether authority competent to ratify issue of writ—Public Health Act, 1936, s. 100. **Warwick Rural District Council v. Miller-Mead,** Widgery J. **590.**

BANKRUPTCY

Salary or income

Life interest under settlement

Whether "income" of bankrupt—Vesting in trustee—Bankruptcy Act, 1914, s. 51 (2). *In re* **Cohen, A Bankrupt,** C.A. **246.**

CAPITAL OR INCOME

Administration or trust

Rent

Rent payable on quarter day—Death of landlord on quarter day—Rent payable in arrears—Rent in advance paid prior to death of landlord—Whether rents received capital or income—Apportionment Act, 1870, s. 2. **In re Aspinall, decd.,** Buckley J. **526.**

CHARITY

Imperfect trust provision

Armed forces associations

Residuary gift to "institutions and associations having for their main object the assistance "and care" of wounded or incapacitated servicemen—Unascertained class of potential beneficiaries—Whether charitable—Gift for division between charitable and non-charitable or not wholly charitable associations—Whether validated by Charitable Trusts (Validation) Act, 1954, ss. 1 (1) (2), 2 (1). *In re* **Harpur's Will Trusts,** Cross J. **38.**

No exclusively charitable object

"Benevolent or welfare fund"—Bequest of fund as benevolent or welfare fund or for welfare purposes for benefit of employees of company—Whether validated by Charitable Trusts (Validation) Act, 1954, ss. 1 (1), 2 (1). *In re* **Wykes, decd.,** Buckley J. **229.**

CHILDREN AND YOUNG PERSONS

Care of

Child received into care by local authority

Child boarded out under statutory agreement—Refusal of foster-mother to deliver up child to local authority—Child made a ward of court on summons issued by foster-mother—Jurisdiction of Chancery Division to consider welfare of child—Children Act, 1948, ss. 1, 2, 13—Law Reform (Miscellaneous Provisions) Act, 1949, s. 9. *In re* **M. (An Infant),** Cross J. **81.**
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CIRCUITY OF ACTION

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Power of advancement—Power to advance cash—Advancement of land approved. *In re* **Collard's Will Trusts,** Buckley J. **293.**

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Scheme

Opposition by minority shareholder—Statutory notice pursuant to offer to acquire shares by transferee company—Application by dissenting shareholder—Compulsory sale of shares—Discretion of court—Purchase order—Whether scheme unfair—Onus of proof—Companies Act, 1948, s. 209 (1). *In re* **Bugle Press Ltd.,** Buckley J. and C.A. **270.**

Scheme for acquisition of shares by transferee company—Whether scheme unfair—Onus of proof. *In re* **Sussex Brick Co. Ltd.,** Vaisey J. **289.**

COMPANY—*continued.*

Capital

Reduction

Capitalisation of reserves resulting from revaluation of capital assets—Article permitting company to capitalise reserves not required for payment of preferential dividend—Whether variation of rights of preference shareholders—Whether legal.
Dimbula Valley (Ceylon) Tea Co. Ltd. v. Laurie, Buckley J. **353.**

Debenture

Receiver

Appointment by debenture holder—Validity—Whether document capable of operating as instrument "by writing" if executed as deed.
Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd., C.A. **375.**

Exempt private company

"*Providing capital*"

Reorganisation—Purchase of shares from members by finance and banking companies—Whether provision of capital for company—Companies Act, 1948, ss. 127, 129 (4); Sch. 7, paras. 1, 2 (1) (2), 7 (1), 9.
Qualter, Hall & Co. Ltd. v. Board of Trade, Cross J. **121.**

Register

Name struck off register

Application "by member or creditor" to restore—Petitioner not member or creditor when company struck off—Bearer shares acquired by and debts assigned to petitioners after dissolution—Whether "member or creditor"—Whether entitled to petition for restoration—Companies Act, 1948, s. 353 (6).
In re **Timbiqui Gold Mines Ltd.**, Buckley J. **319.**

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Contributories

List of—Dispensing with—Surplus assets—Large number of widely held shares—Schedule prepared by liquidator—Whether sufficient evidence of contributories—Whether court should dispense with settlement of list—Companies Act, 1948, s. 257 (1)—Companies (Winding-Up) Rules, 1949, rr. 80–85. *In re* **Paragon Holdings Ltd.**, Buckley J. **346.**

Rights to surplus assets—Rights of preference shareholders to participate in "further "surplus assets"—Whether right of participation remains after paying creditors, costs, arrears of preference dividend and all paid-up capital.
Dimbula Valley (Ceylon) Tea Co. Ltd. v. Laurie, Buckley J. **353.**

CONTRACT

Rectification

Mistaken belief that particular term included

Execution of contract by other party knowing of first party's mistake—Whether first party entitled to rectification.
A. Roberts & Co. Ltd. v. Leicestershire County Council, Pennycuick J. **555.**

CROWN

Prerogative

Statute, application to

Crown as parens patriae—Wardship jurisdiction of Chancery Division—Whether restricted by Children Act, 1948. *In re* **M. (An Infant)**, Cross J. **81.**
C.A. **328.**

Crown as parens patriae—Wardship jurisdiction of Chancery Division—Whether restricted by Education Act, 1944. *In re* **Baker (Infants)**, Pennycuick J. **303.**

DAMAGES

Sale of land

Loss of profit

Intention of purchaser to develop land—Land ripe for development—Breach of contract of sale—Whether knowledge of purchaser's intention imputed to vendor.
Diamond v. Campbell-Jones, Buckley J. **22.**

Tax element

Loss of profits

Contract for sale of land—Purchaser carrying on business as dealer in real property—Breach of contract—Whether damages gross amounts of profits which would have been made. **Diamond v. Campbell-Jones**, Buckley J. **22.**

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Clayton's case (rule in)
Current account—Effect on nature of debt.
In re **Footman Bower & Co. Ltd.**, Buckley J. **443.**

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Lease
Lease executed by landlord company—Delivery of counterpart—Whether landlord bound to exchange lease for counterpart. **Beesly v. Hallwood Estates Ltd.**, C.A. **105.**
Execution
Escrow
Undated—Revocable instructions to agent of grantor—Appointment of receiver—Appointment not intended to become binding until instructions complied with—Validity—Whether delivered as an escrow—Whether undelivered deed—Whether effective instrument under hand.
Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd., Cross J. **88.**
Purported deed
Whether an "instrument in writing"
Appointment of receiver.
Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd., C.A. **375.**

EASEMENT
Sewage and drainage
Right arising at uncertain date in future
Right to use sewers and drains "now passing or hereafter to pass" under private road—No sewers and drains in existence at date of grant—Whether void for perpetuity—Law of Property Act, 1925, s. 162 (1) (*d*) (iv).
Dunn v. Blackdown Properties Ltd., Cross J. **433.**

EDUCATION
School
Attendance
School attendance order—Refusal of parent to comply with school attendance order—Children made wards of court on summons by local authority—Jurisdiction of Chancery Division to consider welfare of child—Education Act, 1944, ss. 36, 37 (2).
In re **Baker (Infants)**, Pennycuick J. **303.**

ESTOPPEL
Conduct, by
Contract
Mistaken belief of one party that term included—Execution by other party with knowledge thereof—Rectification.
A. Roberts & Co. Ltd. v. Leicestershire County Council, Pennycuick J. **555.**

INFANT
Ward of court
Costs
Official Solicitor as guardian ad litem of ward—Wardship proceedings—Whether costs of Official Solicitor payable by parents of ward—Supreme Court Costs Rules, 1959, rr. 2 (5), 3 (2). *In re* **P. C. (An Infant)**, Buckley J. **312.**
Jurisdiction
Child in care of local authority—Whether jurisdiction over child—Law Reform (Miscellaneous Provisions) Act, 1949, s. 9. *In re* **M. (An Infant)**, Cross J. **81.**
C.A. **328.**

Refusal of parent to comply with school attendance orders—Whether jurisdiction over children. *In re* **Baker (Infants)**, Pennycuick J. **303.**

INJUNCTION
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Subsequent criminal proceedings in magistrates' court raising substantially same issue—Jurisdiction to restrain prosecutors from proceeding with criminal proceedings—Whether criminal proceedings vexatious—Whether injunction will issue.
Thames Launches Ltd. v. Trinity House Corporation (Deptford Strond),
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JUDICIAL PRECEDENT
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LANDLORD AND TENANT
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Whether necessary—Lease of three years or under—Freehold owned by two tenants in common—Whether competent for freeholders to grant lease by parol to themselves—"Conveyance"—Meaning—Whether including oral transactions—Law of Property Act, 1925, ss. 52, 54, 72 (4), 205 (1) (ii). **Rye v. Rye,** C.A. **70.**

Business premises (security of tenure)
Notice of opposition to new tenancy
Notice served by present landlord's predecessor—Grounds of opposition that "the landlord "intends to occupy the premises"—Whether new landlord entitled to rely on notice—Meaning in notice of "landlord"—Landlord and Tenant Act, 1954, ss. 30 (1) (*g*), 44. **A. D. Wimbush & Son Ltd. v. Franmills Properties Ltd.,** Plowman J. **419.**

Lease
Option to grant further lease
Lease for 21 years—Option to grant further lease in agreement under hand—Option exercisable more than 21 years from date of lease—Whether option to renew lease or to grant new lease—Whether valid—Whether covenant having "reference to the "subject-matter of the lease"—Whether reversionary estate bound by option—Whether option running with reversion—Whether an overriding interest—Law of Property Act, 1925, ss. 142, 149 (3), 154. **Weg Motors Ltd. v. Hales,** Danckwerts J. **176.**

Rent
When payable
Term continuing until end of date fixed for payment—Time of maturing when tenants' liability to pay—Moment of accrual of costs of action to recover rent. **In re Aspinall, decd.,** Buckley J. **526.**

LEGAL AID
Costs
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Appeal—Sum paid into court by solicitor of legally aided appellant—Appeal dismissed—Payment out to successful respondent—Principle applicable. *In re* **Cohen, A Bankrupt,** C.A. **246.**

LIMITATION OF ACTION
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Rule in *Clayton's* case—Payment generally on account—Whether payment "in respect "of" balance due—Limitation Act, 1939, s. 23 (4). *In re* **Footman Bower & Co. Ltd.,** Buckley J. **443.**

NAME AND ARMS CLAUSE
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Public policy
Uncertainty—Direction to "take use and bear" surname "upon all occasions"—Forfeiture on refusal or neglect, or if person entitled should "discontinue" to use name—Direction applying to married women and their husbands—Whether void for uncertainty—Whether contrary to public policy. **In re Howard's Will Trusts,** Wilberforce J. **507.**

PERPETUITY RULE
Easement
Right to use sewers and drains "hereafter to pass"
Whether void. **Dunn v. Blackdown Properties Ltd.,** Cross J. **433.**

Power of advancement
Power used for resettlement
Application of perpetuity rule. *In re* **Pilkington's Will Trusts,** C.A. **466.**

POWER OF APPOINTMENT
Power of advancement
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In re **Pilkington's Will Trusts,** C.A. **466.**

PRACTICE

Parties

Company which has ceased to exist

Whether necessary party. **Weg Motors Ltd. v. Hales,** Danckwerts J. **176.**

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Questions of mixed fact and law.

Whether procedure appropriate.
Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd., C.A. **375.**

Validity of deed of appointment

Whether procedure appropriate.
Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd., Cross J. **88.**

PUBLIC HEALTH

Nuisance

Action by local authority for abatement

Capacity to sue—Being "of opinion that summary proceedings" inadequate—Resolution accordingly three days after issue of writ by solicitors—Ratification—Public Health Act, 1936, s. 100. **Warwick Rural District Council v. Miller-Mead,** Widgery J. **590.**

RESTRICTIVE COVENANT

Land, whether binding

Covenant "to procure" non-user

No express provision that covenant not made by vendor on behalf of successors and assigns—Whether personally binding on assignee of vendor—Whether "contrary intention" expressed—Law of Property Act, 1925, s. 79 (1).
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